Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Hall Street Associates, L.L.C., Plaintiff-Appellee, Petitioner on Review.

2. Mattel, Inc., Defendant-Appellant, Respondent on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation owning 10% or more of the stock of Petitioner Hall Street Associates, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Hall Street Associates, L.L.C. ("Petitioner" or "Hall Street") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court in which the court vacated the arbitrator's initial arbitration award because of legal error is unreported. (App., *infra*, 39a-58a). The original opinion of the Ninth Circuit Court of Appeals in which the court reversed the district court's enforcement of the parties' "expanded judicial review" agreement and remanded so that the district court could apply the standard of review set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*,

is unreported. (App., *infra*, 114a-116a). The district court's opinion on remand in which the district court vacated the arbitration award based on the FAA standard of review is unreported. (App., *infra*, 117a-128a). The Ninth Circuit's most recent opinion reversing the district court is also unreported. (App., *infra*, 129a-134a).

JURISDICTION

The Ninth Circuit's most recent opinion was entered on August 1, 2006. The Ninth Circuit denied a timely petition for rehearing *en banc* on October 17, 2006. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA are set forth at App., *infra*, 1a-3a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unambiguous terms of the parties' arbitration agreement, an agreement that was entered into with district court approval after the commencement of this litigation. The arbitration agreement expressly states that the district court shall vacate, modify or correct the arbitration award "where the arbitrator's conclusions of law are erroneous." (App., *infra*, 16a). Because of the Ninth Circuit's refusal to enforce the parties' agreement as written, Petitioner is saddled with an arbitration decision that dissenting Judge Susan Graber held was "completely irrational" (App., *infra*, 134a) and which the majority on the Ninth Circuit panel recognized contained "possible errors of law." (App., *infra*, 132a).

STATUTORY FRAMEWORK

Congress enacted the FAA for the "central purpose" of "ensur[ing] that private agreements to arbitrate are enforced

according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotations and citations omitted). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of "any contract evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon any grounds that exist at law, or in equity for the revocation of any contract." 9 U.S.C. § 2. "The effect of this section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA as a whole "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate * * *." *Id.* at 26.

The FAA further provides that "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," the court, upon application by a party to confirm the award, "must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. Section 10 sets forth several very narrow grounds upon which the court "may make an order vacating the award," while section 11 sets forth limited grounds upon which the court "may make an order modifying or correcting the award." 9 U.S.C. §§ 10, 11. The arbitration agreement in this case provides for judicial review beyond the review provided for under sections 10 and 11.

FACTUAL BACKGROUND

This case arose from a property lease between Petitioner Hall Street, the landlord, and Respondent Mattel, Inc. ("Mattel"), the tenant. The lease did not contain an agreement to arbitrate disputes and both parties therefore had the absolute right to have all claims arising under the lease resolved in court. The property that was subject to the lease

had been used for many years by both Mattel and its predecessors as a toy manufacturing facility. (App., *infra*, 18a).[1] It is undisputed that the well water on the property, which employees had used for many years for drinking and bathing, was contaminated by trichloroethylene ("TCE") in concentrations well in excess of federal limits. (App., *infra*, 26a-27a). It is also undisputed that Mattel and its predecessors failed to test the well water on the property for contaminates as they were required to do under the Oregon Drinking Water Quality Act ("ODWQA"), ORS 448.114 *et seq.* (App., *infra*, 26a, 52a, 81a).

On February 11, 2000, Hall Street filed suit in Oregon state court seeking injunctive relief, declaratory relief and damages. (2005 ER 004). Included amongst Its claims was a claim that Mattel was required to indemnify it from all actions by any parties relating to the condition of the property. (2005 ER 016). Mattel removed the case to the United States District Court for the District of Oregon, which possessed diversity jurisdiction under 28 U.S.C. § 1332. (2005 ER 002).

The parties proceeded to a court trial of one of the issues in the case, regarding Mattel's termination of the lease. After the district court decided that issue and after a subsequent unsuccessful attempt to settle the entire case through mediation, the parties informed the district court that they would seek the court's approval of an agreement to arbitrate the remaining issues, an agreement that allowed for *de novo* judicial review of the arbitrator's legal rulings. (2003 SER 148-49). This agreement for expanded judicial review was central to the parties' agreement to arbitrate their dispute, a dispute which was not subject to a preexisting agreement to

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[1] Mattel's Excerpt of Record in the earlier 2003 appeal to the Ninth Circuit is cited as "2003 ER." Hall Street's Supplemental Excerpt of Record in the 2003 appeal is cited herein as "2003 SER." Mattel's Excerpt of Record in the 2005 appeal to the Ninth Circuit is cited as "2005 ER." Otherwise, all citations are to the Appendix.

arbitrate and which could have been properly litigated in federal court in the first instance. (2003 SER 153).[2] The agreement to arbitrate executed by the parties stated that the district court retained authority to review the arbitrator's factual findings for substantial evidence and to review the arbitrator's legal conclusions for legal error. (App., *infra*, 16a).

Relying on the Ninth Circuit's decision in *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), which upheld expanded judicial review of arbitration awards, the district court approved the parties' agreement to arbitrate with *de novo* review of legal issues in the district court.[3] (App., *infra*, 8a, 46a). The case proceeded to arbitration under this judicially approved arbitration agreement.

In early January of 2002, the arbitrator issued his Findings of Fact and Conclusions of Law. (App., *infra*, 17a to 38a). The arbitrator's initial decision was based on his legal conclusion that, despite the fact that Mattel had violated the ODWQA by failing over many years to test the water supply on the property for contaminants, it had not violated any "applicable" environmental laws. (App., *infra*, 35a). The arbitrator recognized (1) that the lease was negotiated in the context that Mattel's predecessor, View-Master, was "the only party with intimate knowledge of the property" and (2) that the lease therefore contained a broad indemnification

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[2] Hall Street's attorney, Jim Finn, executed an affidavit that was filed in the trial court stating as follows: "One of the *primary factors* of this arbitration agreement was that, unlike ordinary binding arbitration, the arbitrator's decision would be reviewable by Judge Jones, and then entered as a judgment of the Federal District Court, which would then be reviewed by the 9th Circuit Court of Appeals." (2003 SER 153) (emphasis added).

[3] Nearly two years after the district court approved the parties' expanded judicial review agreement in reliance on existing law, the Ninth Circuit reversed *LaPine* in *Kyocera v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert dismissed*, 540 U.S. 1098 (2004).

clause that required Mattel to "indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease." (App., *infra*, 19a). The arbitrator further concluded that Mattel agreed to assume all liability for the presence of hazardous waste on the property under this "comprehensive" indemnification clause, irrespective of when the presence or use of the hazardous waste occurred. (App., *infra*, 35a). The arbitrator also recognized that the "only exception" to the indemnity obligation was if Mattel was in compliance with applicable environmental laws and did not directly or indirectly contribute to the presence or use of hazardous waste. (*Id.*).

Despite these findings, the arbitrator concluded that Mattel's admitted failure to test the well water on the property over the course of many years was not a violation of an "applicable" environmental law because the ODWQA was designed to protect human health and was "not designed to protect landowners from having their property protected from environmental contamination." (App., *infra*, 35a-36a). The arbitrator recognized that Mattel and its predecessors did not test the well water for a period of approximately 18 years but found that this failure "may constitute a violation of other laws, but does not constitute a violation of 'applicable environmental laws' regarding TCE." (*Id.*). Based on this conclusion, the arbitrator decided that Mattel was entitled to the contractual exception to the broad indemnification requirements of the lease.

Petitioner moved to vacate the arbitrator's award, seeking *de novo* review of the arbitrator's legal conclusion that Mattel's admitted violation of the ODWQA was not a violation of an "applicable environmental law" within the meaning of the lease. On April 29, 2002, the district court granted Hall Street's motion to vacate and remanded to the arbitrator for further consideration. (App., *infra*, 39a to 58a). The district court held, in agreement with the arbitrator's findings,

that Mattel and its predecessors had failed to test for TCE contamination on the property and that this failure constituted a violation of the ODWQA. (App., *infra*, 42a-43a, 53a-54a). The district judge also agreed with the arbitrator's legal conclusion that the lease was "written to impose broad liability on the tenant for any environmental damage on the property" and that the exceptions to this broad liability contained in the lease "freed the tenant from liability only if it was in compliance with all 'applicable environmental laws.'" (App., *infra*, 53a).

However, the district court ruled that the arbitrator's conclusion that the ODWQA was not an applicable environmental law was erroneous. (App., *infra*, 53a). The district court stated:

> The arbitrator's contrary reasoning – that Oregon's Drinking Water Quality Act ("ODWQA") does not constitute "applicable environmental laws" because "these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination" – is an overly restrictive construction of "applicable environmental laws that is not warranted by the language of the lease." (App., *infra*, 53a-54a).

The court disagreed with the arbitrator's conclusion that a law must protect property to be deemed an "environmental law" and stated that: "*No* environmental statute advances such a purpose; the *purpose* of such statutes is to protect the environment and human health." (App., *infra*, 54a-55a) (emphasis in original). The court further stated that the contention that the ODWQA was not an applicable environmental statute "defies logic." (App., *infra*, 55a).

On remand, the arbitrator entered an amended decision based upon the legally correct ruling that the ODWQA was an applicable environmental law which Mattel had violated.

(App., *infra*, 81a). Therefore, the exceptions contained in the lease to Mattel's broad indemnification responsibility did not apply. (*Id.*). Based on this conclusion, the arbitrator rendered a decision in favor of Hall Street in the amount of $583,971.60 and also awarded declaratory relief against Mattel for all future costs that Hall Street might be required to pay relating to the environmental cleanup of the property. (App., *infra*, 85a). The arbitrator then rendered a supplemental decision awarding attorney fees and costs. (2005 ER 138-141).

Both sides sought review of the arbitrator's amended decision by the district court. (App., *infra*, 87a). Other than with regard to Mattel's assertion that the arbitrator made a mistake in computing prejudgment interest, the district court upheld the arbitrator's amended award. (App. *infra*, 95a, 110a). On May 15, 2003, a district court judgment was entered incorporating both the trial court's initial decision regarding the lease termination issue (which had been tried before the court) and the arbitrator's amended award in favor of Hall Street. (App. *infra*, 111a-113a). The money judgment in Hall Street's favor was for $810,107.49 with six percent (6%) postjudgment interest. (App., *infra*, 112a to 113a).

Both sides appealed from certain aspects of that judgment. Mattel challenged the district court's enforcement of the parties' agreement that the arbitrator's conclusions of law could be reviewed *de novo*, arguing that the Ninth Circuit's intervening *en banc* decision in *Kyocera Corp.* had reversed *LaPine* and that the FAA did not permit judicial review of an arbitrator's decision beyond the standards of review allowed under the FAA. (Mattel's Opening Brief on Appeal, Ninth Circuit Case Nos. 03-35525 and 03-35526, pp. 12-13). Hall Street contended that *Kyocera* was distinguishable because, in that case, the parties' underlying contract contained an arbitration clause allowing for expanded judicial review while, in this case, the parties did not have an arbitration agreement when the lawsuit was instituted and agreed to the expanded

judicial review provision with district court approval after the case had been partially tried. (Hall Street's Combined Opening Brief and Answering Brief, Case Nos. 03-35525 and 03-35526, pp. 31 & n 5). Hall Street further argued that the *de novo* review provision was so inextricably intertwined with the agreement to arbitrate that it could not be severed and still give effect to the parties' intentions regarding arbitration. (*Id.* at 33 n 7).

On November 16, 2004, the Ninth Circuit reversed the district court's vacation of the arbitrator's initial erroneous award holding, without substantial comment, that "*Kyocera* compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court." (App., *infra*, 115a). The court further stated that, under *Kyocera*, "the terms of an arbitration agreement controlling the mode of judicial review are unenforceable and severable." (*Id.*). The Ninth Circuit remanded to the district court with instructions for the district court to confirm the arbitrator's initial award in favor of Mattel, "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." (App., *infra*, 116a).

On remand, the district court held that grounds for vacating the arbitrator's award existed under 9 U.S.C. § 10. (App., *infra*, 117a-128a). The district court held, in express reliance on the Ninth Circuit's decisions in *Theis Research Inc. v. Brown & Bain*, 386 F.3d 1180 (9th Cir. 2004), *amended on denial of rehearing*, 400 F.3d 659 (9th Cir. 2005), and *Employer's Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991), that an arbitrator exceeds his or her powers within the meaning of 9 U.S.C. § 10 when the award is based on an "implausible interpretation of a contract." (App., *infra*, 124a). The district court, noting that neither party seriously disputed that the ODWQA

was an environmental law or that Mattel had violated it, reversed the arbitrator's initial conclusion that Mattel was in compliance with applicable environmental laws on the grounds that this conclusion was implausible. (App., *infra*, 125a-127a). The district court stated that nothing in the lease supported the arbitrator's conclusion that the phrase "applicable environmental laws" meant "anything other than its plain meaning, *i.e.*, the body of environmental law that generally applies to Mattel and with which Mattel's non-compliance could expose Mattel or Hall Street to civil or criminal penalties." (App., *infra*, 126a). The trial court again vacated the arbitration award, granted Hall Street additional attorney fees and costs and again entered judgment for Hall Street. (App., *infra*, 127a-128a).

Mattel again appealed to the Ninth Circuit. On August 1, 2006, a panel of the Ninth Circuit reversed and held that "[i]mplausibility is not a valid ground for voiding an arbitration award under either 9 U.S.C. §§ 10 or 11." (App., *infra*, 132a). The panel majority stated: "Although the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award." (*Id.*). Despite its finding regarding the presence of possible errors of law, the panel majority held that the arbitrator's decision was not "completely irrational," which it recognized as a valid (albeit unstated) basis for vacating an arbitration award under the FAA. (App. *infra*, 133a). The panel majority therefore remanded the case to the district with instructions to review the original award and declare Mattel the prevailing party. (*Id.*).

Judge Susan Graber dissented on the grounds that the arbitrator's award was "completely irrational." (*Id.*). She stated that "the only rational reading" of the term "applicable environmental laws" was "all federal, state, and local environmental laws and regulations" which Mattel was required

to comply with in its use of the premises. (*Id.*). Because it was undisputed that the ODWQA was an environmental law that Mattel violated, Judge Graber would have either upheld the district court under the "completely irrational" standard or remanded the case to the district court for reconsideration under that standard. (App., *infra*, 134a).

Petitioner sought *en banc* review of the Ninth Circuit's opinion. *En banc* review was denied by order of the Ninth Circuit on October 17, 2006. (App., *infra*, 138a). At all relevant times, the Ninth Circuit had jurisdiction over this case under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. There is a Wide, Irreconcilable and Deepening Split Between the Courts of Appeals Over Whether Parties May Agree to Non-statutory Grounds for Vacating an Arbitration Award, a Split which this Court Should Resolve by Granting Certiorari.

In this case, the Ninth Circuit has ruled, in strict reliance on its *en banc* decision in *Kyocera*, that parties to an arbitration agreement cannot agree to judicial review on grounds that expand on those provided for in sections 10 and 11 of the FAA. In *Kyocera*, the Ninth Circuit, reversing its earlier decision in *LaPine*, invalidated as contrary to the FAA the parties' agreement that an arbitration award should be vacated, modified, or corrected if legally erroneous or not supported by substantial evidence. The *Kyocera* court recognized that other circuits had enforced such "expanded judicial review" agreements based on this Court's decisions, including *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), which emphasized that the primary purpose of the FAA is to enforce the agreement of the parties according to its terms. *Kyocera*, 341 F.3d at 999. However, the Ninth Circuit reversed its prior decision in *LaPine* because of its policy judgment that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits

of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* at 998.

The Ninth Circuit's decision in *Kyocera*, as followed by the panel in this case, directly conflicts with the decisions of the First, Third, Fourth, Fifth and Sixth Circuits and is inconsistent with this Court's rulings that the primary purpose of the FAA is to give full effect to the parties' agreement to arbitrate as written. The FAA was intended to create a uniform federal substantive law of arbitration that preempts inconsistent state law. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone*, 460 U.S. at 24. As such, the FAA should not create conflicting outcomes with regards to the enforcement of arbitration agreements in different parts of the country. With the current and deepening split between the circuits on the validity of expanded judicial review under the FAA, many companies that do business on a nationwide basis are faced with such conflicting outcomes based simply on the circuit where the action to confirm or vacate an arbitration award is filed.[4] The widespread disagreement between the federal courts of appeals on an issue of such fundamental importance under a federal statute which has as its goal the creation of a uniform law of arbitration warrants review by this Court.[5]

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[4] Under the FAA, the proper venue for an action to confirm or vacate an arbitration award is the district agreed to by the parties in the arbitration agreement or, if there is none, where the award was made. 9 U.S.C. § 9. However, this Court has held that this venue provision is permissive, not mandatory, and that any venue allowable under the general venue statute for diversity actions, 28 U.S.C. § 1391, is proper. *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000). This raises the specter of forum shopping by parties who will seek to further their chances of either confirming or vacating an arbitration award based on whether the district court sits in a circuit that permits or prohibits expanded judicial review.

[5] A party petitioning for a writ of certiorari is entitled to seek review of all interlocutory decisions preceding the entry of judgment, including

A. The Ninth Circuit's Decision Directly Conflicts with the Decisions of Five Other Circuits.

The Ninth Circuit's decision in reliance on *Kyocera* directly conflicts with decisions from the First, Third, Fourth, Fifth and Sixth Circuits.

In *LaPine*, the Ninth Circuit initially upheld the validity of expanded judicial review under the FAA and followed the decision of the Fifth Circuit in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995). *LaPine*, 130 F.3d at 889.[6] In *Gateway*, the parties' arbitration agreement stated that errors of law were subject to judicial review. *Id.* at 996. Recognizing that this provision expanded the extremely narrow standard of judicial review normally applicable under section 10 of the FAA, the Fifth Circuit held that "[s]uch a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract * * *." *Id.* The court in *Gateway* held that the FAA's standard of review provision was the "default standard of review" which would apply under a silent arbitration agreement but that "the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award." *Id.* at 997 n.3. The court, quoting *Volt*, 489 U.S. at 469, held that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* The court reasoned that a refusal to enforce the parties' contractual expansion of the FAA's default standard of review "would be quite inimical to the FAA's purpose of

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rulings made in an earlier appeal. *See, e.g., Major League Baseball Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); *Hamilton-Brown Shoe Co., v. Wolf Bros. & Co.*, 241 U.S. 251, 257-58 (1916).

[6] The Ninth Circuit in *LaPine* also based its holding on *Volt* and other decisions of this Court, which permitted parties to arbitrate under rules other than those established by the FAA. *LaPine*, 130 F.3d at 888.

ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 996 (quoting *Mastrobuono*, 514 U.S. at 57, quoting in turn *Volt*, 489 U.S. at 479). The holding of *Gateway* has been reaffirmed by the Fifth Circuit in subsequent cases. *See Harris v. Parker College of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592-93 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002).

In *Syncor Int'l Corp. v. McLeland*, 1997 U.S. App. LEXIS 21248 (4th Cir., August 11, 1997), *cert. denied*, 522 U.S. 1110 (1998), the Fourth Circuit followed *Gateway*.[7] In *Syncor*, the arbitration agreement, as in this case, allowed for *de novo* judicial review of legal issues. The court, applying *Gateway*'s reasoning that nothing in the FAA prohibits the parties from "providing contractually for an expanded judicial review of the award," engaged in *de novo* review of the arbitrator's decision. *Syncor*, 1997 U.S. App. LEXIS 21248 at *17.

The next circuit to follow *Gateway* was the Third Circuit. In *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir.), *cert denied*, 534 U.S. 1020 (2001), the court stated: "We now join with the great weight of authority and hold that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own (including by referencing state law standards)." *Id.* at 293. The court ruled that, where the parties have language in the arbitration agreement evidencing their intent to opt out of the FAA's standard of review, "federal law requires that the court enforce the agreement." *Id.* at 292. While the court ultimately held that the arbitration agreement before it did not evidence such an intent, the

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[7] Although the *Syncor* opinion is unpublished, the Fourth Circuit's rules provide that an unpublished opinion issued prior to January 1, 2007, may be cited if the case has "precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." (4th Cir. Local R. 32.1). There is no published opinion from the Fourth Circuit on the issue cited.

holding of the court on the overarching legal issue is clear: An arbitration agreement which evidences a "clear intent to displace the FAA's default standards for judicial review" is enforceable. *Id.* at 295.

The Sixth Circuit has also ruled that parties may contract for expanded judicial review. In *Jacada, Ltd. v. Int'l Mktg. Strategies*, 401 F.3d 701 (6th Cir.), *cert. denied*, 126 S. Ct. 735 (2005), the court stated that "the central purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms" and proceeded to decide whether the judicial review provision of the FAA applied as opposed to the standard of review provision contained in the arbitration agreement. *Id.* at 709-10. Although the court ultimately held that the parties did not intend to displace the federal standard for vacatur under the contractual language used in their arbitration agreement, the court's decision is based upon the clear recognition that such displacement is not prohibited by the FAA. *Id.* at 711-12.

The latest circuit to rule that the FAA permits expanded judicial review is the First Circuit. In *Puerto Rico Telephone Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1785 (2006), the court was faced with a similar issue as in *Roadway* and *Jacada*, whether a generic choice-of-law provision was sufficient to establish the parties' intent to supplant the FAA standard of review of an arbitration award. The court stated that "[t]he issue whether parties by contract can supplant the FAA standard of review has generated substantial litigation." *Id.* at 30. After carefully analyzing *Gateway* and other cases supporting expanded judicial review as well as *Kyocera* and other cases opposing it, the court held: "We agree with the other circuits that have concluded that parties can by contract displace the FAA standard of review but that displacement can be achieved only by clear contractual language." *Id.* at 31. Where, as here, there is no question but that the parties used such clear language in their arbitration agreement, the court in

Puerto Rico Telephone would have certainly enforced the parties' expansion of the FAA's standard of review.

B. The Tenth Circuit, Along with the Ninth Circuit, Has Held that Expanded Judicial Review Undermines Public Policy Under the FAA.

Joining the Ninth Circuit in opposition to the First, Third, Fourth, Fifth and Sixth Circuits is the Tenth Circuit in *Bowen v. Amoco Pipeline, Inc.*, 254 F.3d 925 (10th Cir. 2001). In *Bowen*, the court held that the enforceability of the parties contractually "expanded standard" of judicial review "presents a difficult question." *Id.* at 933. Recognizing that its decision not to enforce such a contractual agreement conflicted with the law in the Fourth and Fifth Circuits, as well as the then-governing law in the Ninth Circuit as set forth in *LaPine*, the court, as in *Kyocera*, cited policy reasons for its holding. *Id.* at 933-35. While recognizing that arbitration even with expanded judicial review "reduces the burden on the courts," the court nonetheless found, on public policy grounds, that expanded judicial review "would threaten the independence of arbitration and weaken the distinction between arbitration and adjudication." *Id.* at 936 & n.6.[8] As stated earlier, *Bowen* and *Kyocera* directly conflict with the decisions of five other circuits.

C. Other Circuits Have Discussed the Issue of Expanded Judicial Review Without Definitive Holdings.

Three other circuits, the Second, Seventh and Eighth, have discussed the issue of expanded judicial review without definitive holdings. For example, in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991), the Seventh Circuit, in a case involv-

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[8] The Ninth Circuit cited *Bowen* approvingly and adopted its public policy rationale in *Kyocera*. *Kyocera*, 341 F.3d at 999-1000.

ing an arbitration award under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, stated in dicta that "[a]n agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation," and the parties "cannot contract for a judicial review of that award because federal jurisdiction cannot be created by contract." *Id.* at 1505.[9] This case did not directly involve the FAA and is thus questionable precedent in cases involving that statute.

In *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), the court noted the split in the circuits "on whether parties to an arbitration agreement can expand the scope of judicial review of arbitration awards." *Id.* at 788. Citing its prior decision in *UHC Mgt. Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), the court stated that the ability to contract for a heightened standard of review is "not yet a foregone conclusion" and expressed "grave skepticism" as to whether parties could do so consistent with the policies underlying the FAA. *Id.* at 789. However, the court chose not to expressly adopt the Tenth Circuit's holding in *Bowen* and instead resolved the case on the narrow ground that the arbitration agreement did not contain clear and unmistakable language establishing the intent to impose a heightened standard of judicial review. *Id.* at 789-90.

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[9] The notion that expanded judicial review creates federal jurisdiction "by contract" was also stated by the Ninth Circuit in *Kyocera*, which quoted *Chicago Typographical* to this effect. *Kyocera*, 341 F.3d at 999. However, as recognized by the First Circuit in *Puerto Rico Telephone*, this concern is "misplaced, as it is well settled that federal courts have jurisdiction over suits to compel arbitration (or to vacate or enforce arbitration awards) only if the parties are of diverse citizenship, or some separate grant of jurisdiction applies." *Puerto Rico Telephone*, 427 F.3d at 30-31. *See also Moses H. Cone*, 460 U.S. at 26 (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction* * *").

The Second Circuit has similarly avoided the issue. In *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 63 (2d Cir. 2003), the arbitration agreement purported to "insulate the substance of the arbitration award from judicial review," even the very narrow review available under the FAA. The court acknowledged that, in those cases where courts "have enforced private agreements to alter the judicial review to be applied to arbitral awards, * * * the cases have involved attempts to raise the level of judicial review otherwise available under the FAA." *Id.* at 64. "While taking no position on the enforceability of agreements to raise the level of judicial review," the court noted "that there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all." *Id.* The court declined to allow private litigants to completely divest the courts of authority to review both the substance of the arbitration award and the arbitration process under section 10 of the FAA. *Id.* at 66. However, the court expressly chose not to address the issue of heightened judicial scrutiny.[10]

D. The Conflict Between The Circuits Will Continue to Deepen Without this Court's Resolution of the Issue.

The substantial divide between the circuits is based on a fundamental, philosophical difference about the purposes of the FAA and is bound to deepen without resolution of the issue by this Court. As recognized by the First Circuit in *Puerto Rico Telephone*, those courts which have upheld expanded judicial review "have held that the Act's ultimate purpose is to enforce the terms of the agreement to arbitrate,

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[10] The court in *Kyocera* went the other route and stated that contracting for a narrower standard of review "may be less troublesome" than a broader, more searching, standard of review, such as is present here. *Kyocera*, 341 F.3d at 999 n.16.

and that they are therefore bound by federal law to enforce the arbitration agreements as drafted." *Puerto Rico Telephone*, 427 F.3d at 31. Those courts which have construed the FAA to preclude expanded judicial review have done so based "on the theory that allowing private parties to contract for more searching review standards would create federal jurisdiction by contract" and "on a public policy concern" that broad judicial review of arbitration decisions would jeopardize the benefits of arbitration. *Id.* at 30-31.

The circuit courts are thus in a square and irreconcilable conflict which is unlikely to resolve itself without guidance by this Court. The issue has gained the attention of several legal commentators, *See, e.g.*, Milana Koptsiovsky, *A Right to Contract for a Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 Conn. L. Rev. 609 (2004); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negotiation L. Rev. 171 (2003); Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 Pepp. Disp. Resol. L. Rev. 47 (2003).[11]

The issue can have important consequences in a particular case. For example, in *Kyocera* the arbitration award at issue was for approximately one quarter of a billion dollars. *Kyocera*, 341 F.3d at 990. The case at bar involves claims that exceed one million dollars. In very large cases, the

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[11] State courts are also in conflict on this issue. For instance, a Texas appellate court followed the Fifth Circuit rule and interpreted the FAA to permit the parties to expand the scope of judicial review. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 250-51 (Tex. Ct. App. 2003). However, the California Court of Appeals in *Cable Connection, Inc. v. DIRECTV, Inc.*, 143 Cal. App. 4th 207, 223 (2006), following *Kyocera*, held that the FAA did not permit expanded judicial review. However, on December 20, 2006, the California Supreme Court granted review and depublished this decision. *Cable Connection, Inc. v. DIRECTV, Inc.*, 2006 Cal. Lexis 15057 (Cal. Dec. 20, 2006).

parties may not want to take the risk that an arbitrator will make a legal error, which is not correctable through judicial review. While these parties may very well have good reason to choose the flexibility, economy and speed which arbitration may offer with regards to the factual issues of the case, they may not be willing to give up the right to meaningful and searching judicial review on the controlling principles of law. The narrow default standards of the FAA simply do not meet their needs.[12]

Petitioner contends that parties should be free to contract for judicial review of an arbitration award beyond the limited scope of review set forth in the FAA. Parties that bargain for expanded judicial review do so with the expectations that the arbitration award will not be permeated with legal error. These contractual expectations should not be frustrated. Certainly, the question of whether such an agreement is enforceable should not depend solely on the circuit in which the arbitration award is issued, a situation which prevails because of the current split in the circuits.

II. The Ninth Circuit's Decision Is Fundamentally in Conflict with this Court's Cases Interpreting the FAA.

This Court has enforced in several cases contract terms that have called for arbitration under rules other than those established by the FAA itself. The Ninth Circuit's decision in this case is in direct conflict with these decisions.

For example, in *Volt*, the parties agreed that their arbitration agreement would be governed by California law. *Volt*, 489 U.S. at 470. California law permitted the trial court to stay an arbitration pending the outcome of other litigation.

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[12] In fact, the court in *Kyocera* stated that the issue of expanded judicial review was "of exceptional importance to future contracting parties and litigants within this circuit." *Kyocera*, 341 F.3d at 997 (emphasis added).

Id. at 471 n.3. Respondent argued that this provision conflicted with sections 3 and 4 of the FAA, which call for the direction of arbitration and a stay of the court proceeding pending arbitration, but which do not permit a stay of the arbitration itself. *Id.* at 476-77. *See also* 9 U.S.C. §§ 3, 4.

The Court rejected this argument in clear and forceful terms:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration. But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 478-79 (citations and quotations omitted).

Similarly, in *Mastrobuono*, the parties' arbitration agreement contained a provision stating that New York law applied. *Mastrobuono*, 514 U.S. at 53. Because New York courts had decided that the power to award punitive damages was limited to judicial tribunals and could not be exercised by arbitrators, the Court was faced with the issue of "whether a contractual choice–of–law provision may preclude an arbitral award of punitive damages that otherwise would be proper." *Id.* at 55. Although the Court ultimately held that the parties did not intend to foreclose an arbitral award of punitive damages, the decision clearly supports the parties' freedom to

contract for such an exclusion if they so desired. In this regard, the Court, citing *Volt*, made the familiar statement that the "central purpose" of the FAA was to ensure that private agreements to arbitrate are enforced according to their terms. *Id.* at 53. Holding that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties," the Court was prepared to enforce the parties' agreement whether it included or excluded punitive damages. *Id.* at 57-58.

Similarly, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court again gave free reign to the parties to structure their arbitration agreement as they saw fit, even if the agreement altered the role of the reviewing court as prescribed by the FAA. In *First Options*, the Court permitted the parties to an arbitration agreement to alter the role of the reviewing court as prescribed in the FAA and to allow the arbitrator to determine, in the first instance, whether the dispute was arbitral. Under the FAA, the determination as to whether a dispute is arbitrable is reserved for the court. For example, section 3 of the FAA states that the court in any proceeding brought upon any issue referable to arbitration shall stay the action until such arbitration has been held in accordance with the terms of the arbitration agreement if the court "is satisfied that the issue in such suit or proceeding is referable to arbitration." 9 U.S.C. § 3. Section 4 states that, in the event that a party to an arbitration agreement fails to proceed to arbitration, the court shall make an order directing the parties to proceed "in accordance with the terms of the agreement." 9 U.S.C. § 4. The normal rule is thus that the court, not the arbitrator, decides arbitrability. *See, e.g., Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 82 (2002).

However, in *First Options*, this Court permitted the parties to alter the traditional role of the court by private agreement. The Court held that the question of "who has the primary power to decide arbitrability turns upon what the parties

agreed about *that* matter." *Id.* at 943 (emphasis in original). The Court's conclusion that the parties could decide the issue flowed "inexorably from the fact that arbitration is simply a matter of contract between the parties * * *." *Id.*

In this case, the Ninth Circuit held that *Kyocera* compelled reversal because the trial court had engaged in *de novo* review of the arbitrator's decision (according to the express terms of the parties' agreement) and had gone beyond the FAA standard of review. However, the reasoning behind *Kyocera*'s holding is contrary to this Court's precedents.

For example, the *Kyocera* rule as applied by the Ninth Circuit in this case gives short shrift to the oft-repeated holding of this Court that the "central purpose" of the FAA is to give effect to the parties' contractual agreement to arbitrate.[13] Rather, the court in *Kyocera* cited to modern views of arbitration, views which extol its supposed speed, economy and informality. *Kyocera*, 341 F.3d at 998.

Elevating these claimed benefits of arbitration over the central purpose of the FAA is contrary to this Court's precedents. As stated in *Volt*, while "Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost by a congressional desire to enforce agreements to which parties had entered.'" *Volt*, 489 U.S. at 477 (citing *Byrd*, 470 U.S. at 220). In *Byrd*, this Court expressly held that efficiency and speedy resolution of claims is not the main concern of the

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[13] This Court's holding that the central purpose of the FAA is to give effect to the parties' agreement is also supported by the FAA's legislative history. *See, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Nowhere does the legislative history assert that an agreement to arbitrate must be enforced only in accordance with the FAA or that a court is precluded from enforcing a contract on its own terms if the contract expands on the FAA's terms. Koptsiovsky, *A Right to Contract for a Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 Conn. L. Rev. at 614-15.

FAA and that it would not overlook what it viewed to be the principal objective of the FAA – specific enforcement of arbitration agreements – in favor of a mere "efficient" dispute resolution. *Id.* at 219-20.[14] Similarly, in *First Options*, this Court held that "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but rather to ensure that arbitration agreements, like other contracts, are enforced according to their terms. *First Options*, 514 U.S. at 947.

As stated earlier, the Ninth Circuit's decision in *Kyocera* was also based on its assumption that expanded judicial review allowed the parties to define the jurisdiction of the district court by contract and/or that the parties were attempting to dictate how the court functioned. *Kyocera*, 341 F.3d at 999. However, this concern is misplaced because the FAA does not create an independent ground for federal court jurisdiction. *Moses H. Cone*, 460 U.S. at 26. In this case, the district court had independent jurisdictional grounds to decide the case based on its diversity jurisdiction and had the power to decide all factual and legal issues in the case until the parties entered into an arbitration agreement after the case was partially decided. The expanded judicial review provision was specifically approved by the district court, which relied on the Ninth Circuit's decision in *LaPine*, which had held that such provisions were enforceable.

As to the Ninth Circuit's concern that allowing expanded judicial review permits the parties to dictate how the court functions, this Court's decisions support the rights of parties to agree to waive statutory and other rights, even if such waiver affects the conduct of the court's proceedings. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 200-01

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[14] The Court in *Byrd* held that the "preeminent concern of Congress in passing the Act was to enforce private agreements to arbitrate***." *Byrd*, 470 U.S. at 221.

(1995) (criminal defendant may waive evidentiary admissibility of plea negotiations); *Sac and Fox Indians of Miss. in Iowa v. Sac and Fox Indians of Miss. in Okl.*, 220 U.S. 481, 488-89 (1911) (waiver of evidentiary rule barring hearsay). It is thus clear that, "absent an affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 513 U.S. at 201.

In addition, courts have permitted parties to waive affirmative defenses that would normally bar the court from deciding the case on the merits. Thus, in *Photopaint Technologies., LLC v. Smartlens Corp.*, 335 F.3d 152, 160 (2d Cir. 2003), the court held that the parties could agree to waive the statute of limitations for confirming an arbitration award under Section 9 of the FAA. Absent the parties' stipulation, the court would have been directed by Congress pursuant to the terms of the FAA not to hear the dispute. *See also United States v. Wilson*, 26 F.3d 142, 154-56 (D.C. Cir. 1994) (discussing various cases which uphold agreements to waive statutes of limitations).

The Ninth Circuit's rule, enforced in this case, that parties cannot waive what would otherwise be their right to have an arbitration award judged under an extremely deferential standard of review is without support in this Court's cases. The rule reflects a judicial approach which applies subjective and varying public policy views over precedent and which affords greater weight to the supposed speed and efficiency of arbitration than to the rights of the parties to contract for the type of arbitration process which best suits their needs. *See Mezzanotto*, 513 U.S. at 207 (the Court criticized the Ninth Circuit for its reliance upon "public policy " to "override the presumption of waivability").

While the Ninth Circuit accepts that the FAA creates only a default standard which the parties can "contract around" for all purposes prior to the final arbitration award, its policy

views cause it to abandon that premise with regards to judicial review, despite the fact that there is nothing either in the text of the FAA or its legislative history to indicate that this was Congress' intent. *Kyocera*, 341 F.3d at 1000. In the face of clear and long-standing authority from this Court that the central purpose of the FAA is to give effect to the parties' agreement to arbitrate, the Ninth Circuit's avoidance of that purpose when it comes to judicial review (and that of the Tenth Circuit as set forth in *Bowen*) is without support and is based solely on the court's views of the public policy benefits of arbitration.

In this case, the parties had the right to have their dispute decided by the district court, which clearly possessed jurisdiction over the case. They sought to conserve their own resources, and that of the district court, by agreeing to try the remaining issues in the case before an arbitrator. However, the central premise of their agreement to arbitrate was that the district court would retain the authority to correct errors of law. Neither side bargained for an arbitration award which contained such errors. Their agreement to arbitrate with expanded judicial review was expressly approved by the district court in reliance on the Ninth Circuit's prior holding in *LaPine*, which approved expanded judicial review under the FAA. The arbitrator's initial decision contained a fundamental error of law, which was corrected by the district court in accordance with the parties' agreement and resulted in a final award in favor of Hall Street.

The Ninth Circuit's reliance on *Kyocera* in this case has the practical effect of reinstating an arbitral ruling on an issue of law which Judge Graber of the Ninth Circuit held was "completely irrational" and which the panel majority recognized might very well be erroneous. The parties' reasonable expectations as set forth in their agreement to arbitrate are thus being directly frustrated, to Hall Street's great disadvantage. However, if the arbitration award had been issued in Boston,

Philadelphia, New Orleans or a myriad of other locations throughout the First, Third, Fourth, Fifth and/or Sixth Circuits, Hall Street would be the prevailing party, not Mattel.

The central purpose of the FAA is to enforce agreements to arbitrate according to their express terms. The holdings of the Ninth and Tenth Circuits undermine this purpose while the holdings of the First, Third, Fourth, Fifth and Sixth Circuits follow this Court's precedents and give controlling weight to this principal purpose of the FAA.

The FAA was also intended to create a uniform federal substantive law of arbitration. The current deep split in the circuits concerning the important issue of expanded judicial review under the FAA frustrates this important statutory purpose as well. This Court should accept review to resolve this important issue of statutory construction under the FAA.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

9 USCS § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USCS § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 USCS §§ 10, 11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law

for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 USCS § 10.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the

use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 USCS § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed OCT 23, 2001]

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

STIPULATION AND [PROPOSED] ORDER
REGARDING AGREEMENT TO ARBITRATE

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The parties, through the signatures of their counsel on this Stipulation, hereby agree to the following:

1. The parties in Case No. 00-355-JO, plaintiff Hall Street Associates, L.L.C., and defendant Mattel, Inc., agree to arbitrate before one arbitrator all remaining issues not decided previously in this case by the Court, the Honorable Robert E. Jones presiding. The arbitrator shall prepare written findings of fact and conclusions of law that may be reviewed by Judge Jones at the request of either party, as more fully described in paragraph 27 of the Rules attached as Exhibit A hereto.

2. All parties agree that the remaining issues in this case are set forth in the pleadings and referenced in the pretrial order and are as follows:

A. Whether the repairs and maintenance that Mattel performed prior to May 31, 2001 satisfied its repair and maintenance obligations under the Lease? If not, what additional repairs and maintenance are required and at what cost?

B. Whether the payments that Mattel has made to Hall Street in connection with litigation brought by third parties satisfied its indemnity obligation under the Lease? If not, what amounts does it owe for:

(1) The *Christopherson* case;

(2) The *Schiffer, Phelps and Keith* cases.

C. Whether Hall Street suffered a loss, and, if so, whether Mattel has any obligation under the Lease to compensate Hall Street for:

(1) Remediation of shallow soil contamination located under the buildings, including the film processing building and injection molding buildings, including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate

for this work that Mattel has previously offered to pay to Hall Street;

(2) Expenses incurred by Hall Street in relation to the Oregon Department of Environmental Quality ("DEQ") proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;

(3) Damages, if any, to Hall Street's use or right to withdraw water from under the property.

(4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property.

(5) Expenses incurred by Hall Street for legal services rendered by Short, Cressman in connection with environmental issues on the property.

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

D. Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

3. The arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law. Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling.

4. The arbitration will leave in place all issues already decided by Judge Jones, including the orders dated December 11, 2000 and May 21, 2001.

5. The parties agree to schedule the arbitration to begin on December 12, 2001, to continue until completed to the

arbitrator's satisfaction. The parties agree that there will be no formal discovery. The parties will exchange expert reports prior to the arbitration, and limit the expert testimony to the opinions contained in those reports as provide by the Federal Rules of Civil Procedure.

6. The parties agree that they will in good faith work together to select an arbitrator, who shall be selected on or before November 1, 2001.

7. The parties agree to extend the Protective Order entered by the Court on April 4, 2001 to cover all matters in the arbitration, including the arbitrator's written findings of fact and conclusion of law.

8. The parties will conduct the arbitration according to the rules attached hereto as Exhibit A.

9. The parties agree that this agreement will bind both parties, and waive any challenge they may have to the procedures set forth in this Agreement.

10. The parties agree that they have both fully participated in the drafting of this Agreement, are represented by counsel, and have negotiated this Agreement at arm's-length, and therefore there will be no presumption that ambiguities, if any, in this Agreement be interpreted against the drafter.

11. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original agreement, but all of which shall be considered one instrument and shall become a binding agreement when one or more counterparts have been signed by each of the parties and delivered to the other.

12. This Agreement constitutes the entire agreement among the parties to it, and supersedes any prior or contemporaneous understandings or agreement with respect to the issues addressed herein. It may be amended only by a written instrument executed by all of the parties.

IT IS SO STIPULATED AND AGREED.

Dated: 10/22/01.

MARC D. BLACKMAN
RANSOM BLACKMAN LLP

PETER HSIAO
SIEGMUND SHYU
MORRISON & FOERSTER, LLP

By: /s/ [Illegible]
MARC D. BLACKMAN, Esq.
Attorneys for Defendant Mattel, Inc.

Dated: 10/22/01.

JAMES M. FINN
DEBRA MALDONADO
SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ James M. Finn
JAMES M. FINN, Esq.
Attorneys for Plaintiff Hall Street Associates, L.L.C.

IT IS SO ORDERED

Dated: Oct. 23, 2001.

/s/ Robert E. Jones
HON. ROBERT E. JONES
U.S. District Court Judge

RULES FOR THE ARBITRATION BETWEEN HALL STREET ASSOCIATES, LLC AND MATTEL, INC.

1. **General**: The parties intend for this arbitration to be conducted, to the extent possible, according to the rules of the Federal Rules of Civil Procedure and Local Rules of the U.S. District Court for the District of Oregon. Where the following rules do not specifically address the issue, the parties agree that the Federal Rules of Civil Procedure will be given the most persuasive weight in the arbitrator's decision on how to resolve the issue.

2. **Service and Filing**.

   A. **Service and Filing: How Made**. All papers will be served and filed by fax and mail on all counsel of record pursuant to Fed. R. Civ. P. 5(b).

3. **Hearing Site**. The arbitration hearing shall begin on December 12, 2001 and be held at the arbitrator's office, or a site to be selected by the arbitrator in Portland, Oregon.

4. **Appointment of Arbitrator**. The arbitrator shall be identified to the Court by November 1, 2001.

5. **Conduct and Role of Arbitrator**. In the arbitration proceeding, an arbitrator shall be bound by the same ethical considerations as that of a judge and will adhere to the conduct prescribed by the Code of Judicial Conduct. After the appointment of the arbitrator, the arbitration proceeding thereafter shall be conducted by the arbitrator.

6. **Restrictions on Communication Between Arbitrator and Parties**. No disclosure of any offers or settlement made by any party shall be made to the arbitrator prior to the announcement of the award. Neither counsel nor any party may communicate with the arbitrator re-

garding the merits of the case except in the presence of, or upon reasonable notice to, all other parties. An application or discussion for a postponement or other such peripheral matters may be communicated directly with the arbitrator when warranted by necessity and time constraints, but only after unsuccessful attempts to communicate through the secretary of the arbitrator and after unsuccessful attempts to discuss the matter via conference call among all concerned.

7. **Compensation of Arbitrator**.

A. **Statement of Time Expended And Expenses**. An arbitrator shall serve a detailed Statement of Time Expended on each party within fourteen days after the award or supplemental award or any earlier termination of the arbitration by settlement or otherwise, accompanied by any refund due to each party who paid the compensation deposit. The Statement of Time Expended shall itemize the dates, task performed, and time spent by the arbitrator on the arbitration, or shall indicate the minimum fee charge, and shall also list expenses reimbursable. The parties shall each pay one half of the arbitrator's fees and expenses.

8. **Postponements**. A hearing date may be postponed only upon just and sufficient cause by the arbitrator, or upon the application of any party to the arbitrator (whose decision shall be final), or by the agreement of the parties.

9. **Issues to be Presented**. The parties agree that the issues to be decided in the arbitration are set forth in the Stipulation and Order Regarding Agreement to Arbitrate, as signed by Judge Jones.

10. **Discovery**. There will be no discovery.

11. **Exchange of Proof**. At least fourteen days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a statement containing a list of witnesses whom the party intends to call at the arbitration hearing, a list of exhibits and documentary evidence. The statement shall contain a narrative statement of the matters about which each witness will be called to testify, which will serve as the witnesses' direct testimony, the address and telephone number of each such witness and affiant, and whether the Witness will testify by telephone. At least seven days prior to the arbitration hearing, each party shall file and serve upon all other parties its exhibits and other documentary evidence, including its expert report, and a "trial brief" for the mediation.

Plaintiff shall designate its experts and serve on the other party the reports required by Fed. R. Civ. P. 26(a)(2)(B) not later than November 2, 2001. Defendant shall designate experts to be called by defendant and serve on the other party the reports required by Fed. R. Civ. P. 26(a)(2)(B) not later than November 30, 2001. Plaintiff shall not be permitted to add any new rebuttal expert, but may serve on the other party rebuttal expert reports not later than December 6, 2001. The rebuttal report will be limited to respond only to matters raised in one of defendant's expert reports, and shall not introduce or address any issue not raised in defendants' report. The mediator will also take into account the fact that defendant is not filing rebuttal reports under this schedule, and allow appropriate rebuttal testimony from defendant's experts at the arbitration hearing. All experts will be limited to testify at trial to the matters identified in their report.

A party failing to comply with the rules delineated in this paragraph may not present at the hearing a witness,

exhibit or documentary evidence required to be disclosed or made available, except with the permission of the arbitrator.

12. **Conduct of Hearing**.

A. **Procedure** The arbitrator shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

1. Make the interrogation and presentation effective for the ascertainment of the facts.

2. Protect witnesses from harassment or undue embarrassment.

B. **Oaths and Evidence**. The arbitration shall be conducted under the Federal Rules of Evidence. A witness shall be placed under oath or affirmation by the arbitrator prior to presenting testimony. If the hearing room has a speaker phone, a witness may testify by telephone, unless the arbitrator finds that this method would be unfair. The arbitrator may question any witness.

C. **Recording**. The hearing shall be recorded by stenographer or electronically by the arbitrator.

D. **Stipulation to Evidence**. The parties should stipulate to the admission of evidence where there is no genuine issue as to its relevancy or authenticity.

E. **Privacy**. Unless otherwise specifically provided by law, the hearing and all proceedings herein shall be private. All matters in the arbitration, including but not limited to any testimony, documents, findings of fact, conclusions of law, or transcript of the proceedings, shall be kept confidential under the terms of the Protective Order entered by the U.S. District Court in this matter on April 4, 2001.

F. **Exhibit/Witness List**. The arbitrator shall make a record of the names and addresses of the witnesses, and the exhibits offered and received into evidence.

13. **Sanction for Failure to Comply with Arbitration Order**. The arbitrator shall have the authority to require a party, an attorney advising each party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure of such party or attorney, or both, to obey an order of the arbitrator.

14. **Subpoena and Contempt Power**. The arbitrator shall have the power granted in 9 USC Sec. 7 to compel the attendance of witnesses duly notified by either party and to enforce from either party the production of all books, papers and documents deemed material to the cause by the arbitrator. The arbitrator or a party shall have the right granted in 9 USC Sec. 7 to initiate contempt proceedings against any witness or party refusing to answer a subpoena or obey any lawful order of the arbitrator.

15. **Failure or Refusal of a Party to Participate; Prima Facie Hearing**. The failure, refusal, or inability of any party to participate in the arbitration process or to attend the hearing or any portion thereof, or a party's failure to obtain an adjournment or postponement of the hearing or any portion thereof after due notice thereof, shall not prevent the arbitration process from continuing or prevent the hearing from taking place as scheduled or prevent an award from being rendered. However, the arbitrator shall not render an award except upon evidence made at the hearing sufficient to support the award rendered.

16. **Adjournments**. Upon the request of any party and at the discretion of the arbitrator, the hearing maybe adjourned from time to time. The hearing shall be adjourned upon the joint request of all parties.

17. **Closing of Hearing**. After each party has stated that it has no further evidence to present, the arbitrator shall declare the hearing closed and may thereupon, at the discretion of the arbitrator, hear oral arguments of the parties.

18. **Reopening of Hearing**. A hearing may be reopened prior to the rendering of the award upon the motion of the arbitrator or by the arbitrator upon the application of any party if, in the discretion of the arbitrator, it appears just and proper to do so.

19. **When Decision Due**. The arbitrator shall render a written decision promptly and shall make every reasonable effort to render the award within fourteen days from the close of the hearing.

20. **Scope of the Decision**. The arbitrator shall prepare written findings of fact and conclusions of law.

21. **Form of Decision and Delivery**. The decision shall be in writing and signed by the arbitrator. A signed original of the award shall be served upon each party by fax on the date it is signed, and by regular mail.

22. **Costs and Attorney's Fees**.

A. **Procedure**. If the arbitrator decides that the Lease requires the payment of attorney's fees and costs to either side, the arbitrator shall require the prevailing party to submit a statement containing a detailed, itemized list of such fees and costs sought in compliance with the Federal Rules of Civil Procedure and the Local Rules of the U.S. District Court for the District of Oregon. The arbitrator shall provide the non prevailing party an opportunity to submit a written objection, also in compliance with the Federal Rules and Local Rules as stated above. The arbitrator will set a schedule for the submission of these items, and issue

a supplemental decision without farther hearing (unless requested by the arbitrator) that contains findings of fact and conclusions of law sufficient to support any such payment. The award shall specifically state the award in a dollar amount,, and provide that payment is to be made in 30 days from the date of decision. The supplemental decision shall be issued within 21 days of the decision issued pursuant to Paragraph 19 above,, following the same form and procedure for the entry of that decision, and shall be limited to the issue of costs and attorney's fees.

23. **Correcting an Award**.

A. **Purpose**. A decision or supplemental decision may be amended by the arbitrator to correct an inadvertent miscalculation, description, designation, etc., or a typographical error or misplaced decimal point. An amended award shall not change any decision on its merits.

24. **Confirmation of Award by Judgment**. The parties will submit the decision and supplemental decision to U.S. District Court for the District of Oregon (U.S. District Judge Robert E, Jones, presiding) within thirty (30) days after the issuance of the decision, for the confirmation of the decision as a judgment of such court. Either party may request that the Court set a briefing schedule for review or modification of the decision. Any Court review of the arbitrator's decision shall be as set forth in paragraph 27 below.

25. **Return of Exhibits**. The exhibits and any recording of the proceeding will be submitted upon request of either party to the U.S. District Court for its review. If these materials are not requested by the Court, the arbitrator may request that the parties stipulate to the release and/or destruction of these materials.

26. **Modification of Rules by Stipulation**. The parties may by stipulation modify any of these rules.

27. **Judicial Review of Arbitrator's Findings of Fact and Conclusions of Law**. The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

28. **No Contesting of Arbitration Rules**. The parties agree that no party shall contest in any court of law the arbitration rules set forth herein as contrary to any law, regulation, rule, or guideline.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

ARBITRATOR'S FINDINGS OF FACT AND
CONCLUSION OF LAW

FINDINGS OF FACT

1. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is a Washington limited liability company and is the owner of certain property in Washington County, Oregon, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Property"). Cascade Square Associates ("Cascade") is the sole principal of Hall Street and its predecessor-in-interest.

2. Defendant Mattel, Inc. ("Mattel") is a Delaware corporation doing business in Oregon. Its "predecessors-in-interest," as that term is commonly understood, but without regard to the "Lease" referred to below, are View-Master International Group, Inc., and View-Master Ideal Group (collectively "View-Master"); and Tyco Industries, Inc., Tyco Manufacturing Corporation, and Tyco Toys, Inc. ("collectively "Tyco").

History of the Property

3. The Property was once a part of a larger, 50-acre L-shaped property. The larger property consisted of three distinct parcels, known as Parcels 1, 2, and 3.

4. From 1951 to 1967, Sawyers, Inc. ("Sawyers") owned Parcels 1, 2, and 3, and operated a toy manufacturing facility.

5. In 1967, GAF acquired Sawyers and continued operations at the site.

6. In 1979, GAP sold Parcel 3 to the Southern Pacific Industrial Development Company.

7. In 1981, GAF sold Parcels 1 and 2 to View-Master.

8. View-Master owned and operated Parcels 1 and 2 from approximately 1981 to 1983.

9. In 1983, View-Master sold Parcels 1 and 2 to Western International Properties (also known as Western Industrial Properties), but leased back Parcel 1 to continue its manufacturing activities.

10. In 1984, Western International Properties subdivided Parcel 1, with the northwest corner sold to Commercial Real Estate Company, which redeveloped it as an office building. The remaining portion of Parcel 1 (the "Property") was sold to John Eyler in 1984. Mr. Eyler subsequently conveyed Parcel 1 to Cascade in 1985.

11. In 1989, Tyco acquired the assets of View-Master, which remained a subsidiary of Tyco.

12. In 1997, Mattel acquired Tyco.

13. In 1998, Cascade transferred its ownership interest in the Property to Hall Street.

14. On May 31, 2000, Mattel sent Hall Street a Notice of Termination informing Hall Street that it was terminating the lease effective May 31, 2001, almost two years prior to the scheduled lease termination date in 2003. At an earlier stage

of this litigation, Hall Street alleged that Mattel's early termination of the lease term was not permitted under the terms of the lease. Judge Jones bifurcated that issue from the issues in this arbitration and, after a two-day bench trial, concluded that Mattel's termination did not violate the agreement. Accordingly, Mattel's early termination of the lease is not an issue in this arbitration.

15. The Lease terminated and Mattel vacated the Property on May 31, 2001. Except for remediation efforts, the Property remains unoccupied.

The Lease

16. On March 5, 1991, View-Master entered into a Lease Agreement with Cascade for the Property (the "Lease"). On April 26, 1996, Cascade and View-Master executed a First Amendment to the Lease, which, among other items, extended the term of the Lease.

17. The Lease was negotiated by Robert Hibbs, an attorney and partner of Cascade, for the Landlord, and Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. Both parties participated in drafting certain portions of the Lease.

18. The Lease was negotiated in the context that View-Master was the only party with intimate knowledge of the property and would, therefore, indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease of June 1, 1985, with limited exceptions.

19. The Lease replaced the Original Lease dated June 1, 1985, which had provided in Section 6.3 as follows:

> **"Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising out of or related** to any action or inaction of Tenant, its employees, agents or invitees or **any condition of the Property."** (Emphasis added.)

20. The recitals to the Lease provide as follows:

> **"B. View-Master designed and constructed the Premises as a toy manufacturing facility at a time when it owned the underlying real property. View-Master has been the only party to occupy or conduct business on the Premises. View-Master continued to lease the Premises front Landlord pursuant to the Original Lease which provided that View-Master Indemnified Landlord for** its actions with respect to the Premises or **any condition of the Premises. The parties intended that such Indemnity applied to** Tenant's actions in constructing the Premises, including its choice of building materials, and **all activities with respect to the Premises whether or not they occurred before the date of the Original Lease**.
>
> **C. In Executing this Lease, the parties intend that Tenant shall assume View-Master's obligation to indemnify Landlord under the Original Lease, which indemnity obligation shall survive termination of the Original Lease, and intend that Tenant shall indemnify Landlord for any actual or potential liability Landlord may be exposed to as a result of Tenant's future actions with respect to the Premises. Because the Premises are a self-contained manufacturing facility constructed and previously owned by View-Master, and because the Original Lease was on a triple net basis, Landlord has not been actively involved in managing the Premises and relied on View-Master's agreement to indemnify Landlord for Its actions."** (Emphasis added.)

21. In addition, the Lease contains the following relevant sections:

a. Section 5(b) provides, in pertinent part:

> **"Tenant shall comply at its expense with all applicable laws, rules and regulations of any public**

authority, including but not limited to those regarding maintenance, **operation, and use of the Premises**, use of machinery and signs on the Premises, **and those regarding discharging hazardous materials** or any other waste." (Emphasis added.)

b. Section 5(c) provides, in pertinent part:

"Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises or Landlord's adjoining property, or are reasonably offensive to Landlord, or other owners or users of adjoining property."

c. Section 8(a) provides:

"Maintenance of the Premises. **Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises, including without** limitation the heating, ventilating, air conditioning, mechanical, electrical, elevator, and plumbing systems, **structural roof, walls, and foundations**, the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas **as and when required or requested by any governmental agency or when needed to preserve them in good repair, operating condition, working order and good appearances, and regardless of whether the repairs are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. All such repairs will be in quality and class equal to the original work or installations."** (Emphasis added.)

d. Section 12(a) provides, in pertinent part:

"Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises, including but not limited to the Resource

Conservation and Recovery Act, as amended (RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes] whether occurring before the Lease Commencement Date, or during the Lease term." (Emphasis added.)

e. Section 12(b) provides:

"Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees **of hazardous substances** as herein defined **on the Premises**. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, **Tenant assumes liability for the use or presence** in the Building materials or **on or about the Premises of any hazardous waste** including but not limited to asbestos or lead. **Tenant assumes** all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and **defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs) or liabilities directly or indirectly resulting or arising from any such release or presence or use or hazardous building materials.** Subject to the conditions of Section 12c, below, this provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision or the Premises are vacated by Tenant," (Emphasis added.)

f. Section 12(c) provides, in pertinent part:

"To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding

the foregoing language in Section 12.b. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

g. Section 12(d) provides:

"Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following: . . .

(b) Any substance defined as "hazardous substance," "hazardous material," or "toxic substance" in:

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state, or local law or regulation now or hereafter in effect."

h. Section 13(a) provides:

> **"Indemnification. Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its** officers, contractors, licensee; agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors **in or about the Building or Premises as a result of any act, omission or negligence of Tenant or its** officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors in interest,** or visitors, **whether occurring** in the construction of or choice of building materials for the Building, **occurring during or prior to the Original Lease [or] during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant.**
>
> **In the event that Landlord is sued for failure to comply with local, state or federal environmental laws and/or regulations regarding the Premises,** and it is alleged the spill or violation occurred over a number of years, some portion of which time is outside of the term of this Lease or the Original Lease, then Landlord shall agree to seek to have the other tenants (whether prior or subsequent to the Lease or Original Lease) pay for their prorated amount of Landlord's defense costs in such suit. Tenant's obligation to defend shall not be delayed but shall be limited to its allocable portion of such defense costs. . . .
>
> **To the extent Tenant has been in compliance with applicable environmental laws,** notwithstanding the foregoing language in Section 13.a. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. . . .

(iv) Any other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc. . . .

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

i. Section 20 provides, in pertinent part:

"[U]pon expiration of the term of this Lease, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys thereto, to Landlord in as good condition as when received by View-Master from Landlord under the Original Lease or as thereafter improved, reasonable use, wear and tear excepted."

j. Section 31 provides:

"The Premises and Landlord's adjoining property are both served by a drainage system which consists of open grates and underground sewers and catch basins. Tenant shall maintain in good condition and repair the portion of such system on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system.

k. Section 32 provides:

> "The Premises and Landlord's adjoining property are both served by one unified sanitary sewer system. Tenant shall be responsible for maintaining in good condition and repair the portion of such system located on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

19. During the negotiations, View-Master asked Cascade to remove the term "predecessors-in-interest" from Section 13a, fearing that the language would later be interpreted to include Sawyers and GAF. Cascade refused, but did agree to add other language to Section 13 limiting View-Master's liability if certain conditions were met. Despite that refusal, View-Master signed the Lease.

Environmental Issues at the Property

22. From approximately 1951 to 1980, GAF/Sawyers used trichloroethene ("TCE") to remove grease from metal parts. The degreasing operations occurred in a building on Parcel 2, where TCE contamination of the shallow groundwater is found today. GAF/Sawyers also disposed of sanitary wastes via a septic tank and drainfield located at the north end of Parcel 1, where shallow groundwater contamination is also found today. Spills of TCE by GAF/Sawyers occurred at the degreasing location and other areas. Drums of degreaser wastes were dumped on Parcel 3 by GAF/Sawyers. There is no evidence of TCE use at the facility after GAF sold the Property in 1981.

23. The well and water tower on Parcel 1 were installed in 1950. The on-site well supplied facility water.

24. During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants.

25. In March 1998, during testing performed at the instance of Hall Street by SECOR, an environmental consultant, water from the well was discovered to contain TCE at levels far in excess of the federal maximum allowable level. Efforts were initiated under the auspices of the Oregon Department of Environmental Quality ("DEQ") to investigate the environmental contamination problem and plan remedial efforts. Those investigations revealed contamination of the Property and adjacent parcels by several types of contaminants, including TCE, petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was determined to exist not only in the on-site well, but also in the shallow soil, groundwater, and deep aquifer underlying the Property.

26. Mattel shut down the well upon discovery of the contamination. This shutdown is permanent and Hall Street has lost any water rights it had.

27. There is insufficient evidence to prove that Mattel's use of the well after 1981 circulated TCE and resulted in additional contamination of the shallow soil and groundwater.

28. There is insufficient evidence to prove that the condition of certain pipes after 1981 resulted in TCE leaks and additional contamination of the shallow soil and groundwater.

29. In November 1998, Mattel and GAF entered into a consent order with DEQ. GAF agreed to investigate the environmental conditions of the Property, and Mattel agreed to provide public outreach and communications to the employees. Interim cleanup actions to address areas of immediate concern were completed during the Summer of 2001.

30. As part of the site investigation, a risk assessment was performed under DEQ's direction to evaluate all contaminants at all areas. The risk assessment identified current and future risks at the site in two locations. First; unacceptable risk was identified from TCE in the deep aquifer if that source is to be used as drinking water. The risk assessment also identified possible impact to ecological receptors in the

wetland, if untreated water from the deep groundwater were ever to be pumped to the surface and discharged.

31. Second, unacceptable risk was identified from TCE in the shallow groundwater located at Parcel 2 in the location of spills from GAF/Sawyers at the degreasing machine area and at Parcel 1 in the GAF/Sawyers drainfield urea. This risk was limited to trench workers who may be exposed to shallow groundwater in those areas, should there be any excavation of those areas in the future. The shallow groundwater in all other areas of the Property have only low levels of TCE and other associated compounds present, and therefore no current or future remediation or special conditions are necessary.

32. Petroleum hydrocarbons were also identified in the soil located under Buildings 400 and 800/900 that were used by both GAF and View-Master for injection molding machines and boilers. Because the hydrocarbons capped by the building are immobile, and have low toxicity, DEQ has found that the hydrocarbons are posing no risk and is not requiring their remediation. However, if the buildings were ever removed, and the soil was subsequently disturbed, the hydrocarbons in the soil must, under DEQ's direction, be properly treated.

33. The contaminants in the soil in the remainder of Parcel 1 are below residential cleanup standards; therefore, no current or future remediation or special conditions are necessary as to the shallow soil.

34. The investigation and cleanup of contamination at the Property, to the extent required by DEQ, is being addressed by G-1 Holdings, the successor to GAF, under DEQ's supervision. On October 29, 2001, DEQ issued its Recommended Remedial Action Staff Report for the Property.

Repair Issues

35. In general, View-Master, Tyco, and Mattel failed to repair and maintain the Property as required by Section 8a prior to 2000.

36. In preparation for terminating the Lease and vacating the Property, Mattel engaged in an extensive program to assess and repair the facility.

37. Mattel offered to pay the Landlord the cost of repair, in lieu of performing them, if the Landlord intended to tear down the buildings to redevelop the Property. Hall Street refused.

38. Mattel provided a list of repairs to the Landlord before beginning work. Mattel kept Hall Street informed by providing regular status reports and providing Hall Street with the opportunity to inspect the work. Neither Hall Street nor Mortenson, Hall Street's consultant, responded to the letters, and neither visited the Property or criticized the work while it was performed.

39. The City of Beaverton inspected repairs on the roof and other building elements both before and after the work was completed, and approved all work performed. All of the materials used in the work performed were equal or better in quality and class to the original work.

40. Mattel expended more than one million dollars in repairs to the Hall Street facility in 2000. In its final inspections before returning the Property to the Landlord at the end of May 2001, Mattel determined that the structures were in good condition, that none of the roofs leaked, and that all of the mechanical, electrical, water and other equipment, pipes, fixtures, pavement and systems on the Property were in good working order.

41. Hall Street presented no evidence regarding the condition of the Property when View-Master began its lease:

Third Party Lawsuits

42. Hall Street and Cascade were sued by former employees of Tyco for their negligence as Landlord for the TCE Contamination. These cases are identified as the Keith,

Phelps, and Schiffer cases. Those cases were subsequently dismissed for lack of proof of any injury caused by any condition at the property.

43. Hall Street incurred expenses defending those claims and seeks indemnification from Mattel.

44. GAF, Hall Street, and Mattel were also sued by the daughter of a Tyco worker in the Christopherson case for personal injuries allegedly caused by TCE contamination at the Property. That case was subsequently dismissed for lack of proof of any injury caused by any condition at the property.

45. Schwabe, Williamson & Wyatt was the only counsel of record for Hall Street in the *Christopherson* cases, Mattel has paid for those attorneys' fees and costs.

46. In addition, Hall Street incurred defense costs from Short, Cressman & Burgess, the law, firm of Mr. Robert Hibbs, in defending the Christopherson case and seeks indemnification from Mattel.

47. The Court previously ruled that Hall Street's "conduct did not result in a waiver of the indemnity requirement" in the Christopherson case. The parties dispute whether this constituted a determination that Mattel was required to indemnify Hall Street for defense costs in Christopherson.

CONCLUSIONS OF LAW

1. The Arbitration Agreement between the parties defines the issues for decision in this Arbitration:

> (a) Whether the repairs and maintenance that Mattel performed prior to May 31, 2001 satisfied its repair and maintenance obligations under the Lease? If not, what additional repairs and maintenance are required and at what cost?

(b) Whether the payments Mattel made to Hall Street in connection with litigation brought by third parties satisfied its indemnity obligation under the lease? If not, what amounts does it owe for:

(1) The *Christopherson* case:

(2) The *Schiffer, Phelps*, and *Keith* cases.

(c) Whether Hall Street suffered a loss, and, if so, whether Mattel has any obligation under the Lease to compensate Hall Street for:

(1) Remediation of shallow soil contamination located under the buildings, including the film processing building and injection molding buildings, including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street;

(2) Expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;

(3) Damages, if any, to Hall Street's use or right to withdraw water from under the property;

(4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property;

(5) Expenses incurred by Hall Street for legal services rendered by Short, Cressman in connection with environmental issues on the property; and

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

(d) Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

2. Hall Street brings each of these claims against Mattel under the theory of breach of contract. That is, Hall Street alleges that Mattel breached the Lease. Under Oregon law, to maintain an action for breach of contract the plaintiff must establish (1) a valid contract between the parties, (2) a breach or failure without legal excuse to perform any promise that is a part of the contract, and (3) resulting damages to the plaintiff. 17A Am. Jur. 2d Contracts § 716 (1991); Reliable Credit Assoc. Inc. v. Credithrift of America, Inc., 570 P.2d 379, 381 (Or. 1977). For there to be a valid contract, the party bringing the action must be in compliance with the terms of the contract, and not in breach. 17A Am. Jur. 2d Contract § 716 (1991). Hall Street, as the plaintiff in this action, has the burden of proof to establish all requisite elements to maintain a breach of contract. Pickard v. Or. Senior Citizens, Inc., 395 P.2d 168, 170 (Or. 1964).

Lease Interpretation

3. Under Oregon law, the construction of a contract is a question of law for the court. *Anderson v. Divito*, 130 Or. App. 272, 277, 908 P.2d 315 (1995) (citing *Timberline Equip. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 281 Or. 639, 643, 576 P.2d 1244 (1978)). The court's goal is to give effect to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763 (1997) (citing *Investment Serv. Co. v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and O.R.S. 42.240 (in the construction of a written instrument the intention of the parties is to be pursued if possible)).

"To interpret a contractual provision . . . , the court follows three steps. First, the court examines the text of the disputed provision, in the context of the document as a whole." *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997). "If the provision is clear, the analysis ends." *Id.*

> When considering a written contractual provision, the court's first inquiry is what the words of the contract say . . . . To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Id. (quoting *Eagle Indus., Inc. v. Thompson*, 321 Or. 398, 405, 900 P.2d 475 (1995).

A contract or tennis unambiguous if it has only one sensible and reasonable interpretation. *D & D Co. v. Kaufman*, 139 Or. App. 459, 462, 912 P.2d 411 (1996). For a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. *Moon v. Moon*, 140 Or. App. 402, 407, 914 P.2d 1133, *rev. den.*, 323 Or. 484, 918 P.2d 848 (1996).

If the contractual provision at issue is still ambiguous after examining the text and its context, the second step "is to examine extrinsic evidence of the contracting parties' intent." *Yogman*, 325 Or. at 363. In determining whether an ambiguity exists, the court may consider parol and other extrinsic evidence. *Moon*, 140 Or. App. at 407; *see also Adams v. Knoth*, 102 Or. App. 238, 243-44, 794 P.2d 796 (1990) ("in deciding if the language of a contract is ambiguous, it is

proper for the court to consider extrinsic evidence regarding the circumstances under which the agreement was made or to which it relates."). The parties' "practical construction of an agreement may hint at their intention." *Yogman*, 325 Or. at 364.

If the first two analytical steps have not resolved the ambiguity, the court proceeds to the third and final analytical step: the use of "appropriate maxims of construction." *Id.* Presumably, if the language is still ambiguous, then what the parties intended by that language is to be decided by the trier of fact. *See Oregon Sch. Employees Ass'n v. Rainier Sch. Dist. No. 13*, 311 Or. 188, 194, 808 P.2d 83 (1991) ("If contract terms are ambiguous, then the trier of fact is to ascertain the intent of the parties and construe the contract consistently with their intent.").

4. Considering the text of the Lease as recited in Paragraphs 18 and 19 of the Findings of Fact in the context of the document as a whole, I conclude as follows:

a. The Lease, as written, is not ambiguous.

b. Repairs/Maintenance: Sections 8a and 20 must be read together. Mattel assumed all repair and maintenance obligations, with all such repairs to be in quality and class equal to the original work or installations. This obligation is in no way diminished by the terms of Section 20. However, nothing in the Lease requires Mattel to build new buildings, to bring existing buildings up to current code requirements, or to retrofit the buildings to comply with the accessibility requirements of the American with Disabilities Act ("ADA").

c. Indemnification: The term "predecessors-in-interest," as used in Section 13a, includes Sawyers and GAF. The term would otherwise be meaningless since View-Master, the tenant under the Lease, had

no other predecessors-in-interest. Therefore, Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease: The only exception arises when Mattel, Tyco, and View-Master (i.e., not including Sawyers and GAF) have been in compliance with applicable environmental laws and have not directly or indirectly contributed to the presence or use of the particular hazardous waste. This exception applies to both the cleanup of hazardous wastes and to any other liability, damages, or expenses.

d. Environmental: In addition to the indemnification clause, Section 13a, Mattel agreed in Section 12 to assume all liability for the use or presence of hazardous wastes irrespective of when the use occurred. However, the same exception applies.

Environmental Issues

5. TCE: Mattel is not liable for the TCE contamination to the shallow soil and groundwater on the Property. Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13a have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test for, or otherwise discover, the TCE contamination does not constitute a violation of "applicable environmental laws" regarding TCE.

6. TPH: Mattel is liable for the TPH contamination under Buildings 400 and 800/900. Although this contamination poses no immediate risk and remediation is only required if the buildings are removed, it must eventually be cleaned up. Mattel is only responsible for remediation costs and not for any demolition or restoration costs since the cleanup is not required until the buildings are removed. The cost of exca-

vating, hauling, and disposing of this soil and concrete is not "in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street," *i.e.*, $130,000.00.

7. Water Rights: Mattel is not liable for loss of the use of the well due to TCE contamination of the deep aquifer. Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with TCE and, therefore, the exception to liability under Sections 12 and 13a have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test well water for contaminants may constitute a violation of other laws, but does not constitute a violation of "applicable environmental laws" regarding TCE.

Hall Street specifically argues that Mattel violated "applicable environmental laws" by violating ORS § 448 and OAR § 333-061, which are provisions administered by the Oregon Health Division of the Department of Human Resources that obligate both the owner and operator of public water systems to test the water. However, as far as the Lease is concerned, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination.

8. Expenses: Mattel is not liable for the expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, for environmental consulting services performed by Dames & Moore, for legal services rendered by Short, Cressman, or in pursuing claims against its own insurers. These expenses primarily relate to TCE contamination for which Mattel is not responsible and the non-TCE related expenses cannot be readily determined from the evidence.

Repair Issues

9. Mattel met its repair and maintenance obligations under Sections 8a and 20 prior to vacating the Property on May 31, 2001.

10. The Lease did not require Mattel to upgrade the facility beyond what was required during its leasehold interest, since such upgrades would clearly be in "quality and class" greater than the original works. Oregon statutes explicitly do not require buildings to upgrade to newer requirements so long as the same occupancy is being continued. Uniform Building Code § 1101.5, 3401; Oregon Electrical Specialty Code, Chapter 27.01.040; see also Prudential Insurance, .65. F.3d at 372-74.

11. Therefore, since none of the required repairs involved substantial alterations to the buildings on the Property, Mattel was not required to bring the buildings up to current code standards or to bring the buildings into compliance with the accessibility requirements of the American with Disabilities Act.

12. The only evidence is that the leak in the roof over Building 800 developed after May 31, 2001.

Indemnity front Third-Party Lawsuits

13. Hall Street is not entitled to any further indemnification from Mattel for the third-party lawsuits since these claims all related to TCE contamination. As noted above, Mattel is not liable for the TCE contamination, having met the exception under Sections 12 and 13a. Section 13a(iv) likewise provides an exception to liability for the costs of defending these lawsuits.

CONCLUSION

Based on the foregoing, the ultimate issues are answered as follows:

A. The repairs and maintenance that Mattel performed prior to May 31, 2001, satisfied its repair and maintenance obligations under the .Lease.

B. The payments Mattel has made to Hall Street in connection with litigation brought by third patties has satisfied its indemnity obligation under the Lease.

C. Hall Street has not suffered any compensable losses for soil contamination in excess of the amount previously offered to Hall Street by Mattel, for expenses relating to the deep aquifer contamination, for damages from the right to withdraw water, for expenses for consulting services performed by Dames & Moore, for expenses for legal services rendered by Short Cressman, or for expenses incurred in pursuing claims against Hall Street's insurers.

D. Considering the foregoing and the Court's prior rulings in this case, Mattel is the "prevailing party" for purposes of this litigation and is entitled to its attorneys' fees, costs, and expenses under the Lease incurred as a result of this litigation.

IT IS THEREFORE the Order of the Arbitrator, pursuant to the Arbitration Agreement between the parties, that judgment be granted to Mattel, Inc. on all issues presented, and Hall Street take nothing beyond the sum of $130,000.00 previously offered. Mattel is directed to submit its statement of attorney fees and costs by January 11, 2002. Hall Street is directed to file its objections by January 18, 2002. Oral argument, if requested, 'will be held via conference telephone call thereafter.

Dated this 2nd day of January, 2002.

/s/ Larry T. Coady
LARRY T. COADY
Arbitrator

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed APR 29, 2002]

Case No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

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JONES, *Judge*:

OPINION AND ORDER

Plaintiff Hall Street Associates ("Hall Street") brings this action against defendants Mattel, Inc. ("Mattel") and its predecessors for indemnification arising out of a lease agreement. Having resolved the other issues in prior proceedings, the court now addresses the issue of Mattel's liability for environmental cleanup and related costs. These issues were submitted to an arbitrator on December 12-14, 2001, who found generally in favor of Mattel and awarded fees and costs.

The case is now before me on Hall Street's Motion for an Order Vacating, Modifying and/or Correcting the Arbitration Findings of Fact and Conclusions of Law (# 70) and Hall Street's Motion to Strike (# 79). After considering the parties' arguments, Hall Street's Motion to Vacate (# 70) is GRANTED and its Motion to Strike (# 79) is DENIED as moot.

BACKGROUND

This case involves several disputes between a landlord and its tenant over the tenant's obligations under a lease agreement. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is the owner of the property at issue, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "property"). Defendant Mattel, a Delaware corporation doing business in Oregon, leased the premises from Hall Street, until May 31, 2001.[1] In this portion of the action, Hall Street

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[1] In its original complaint, Hall Street also asserted that Mattel was attempting to prematurely terminate its lease in violation of the lease agreement. After a bench trial in which the court reviewed the lease agreement and parol evidence surrounding its execution, I held that Mattel could terminate its lease, anytime after May of 1997, with one year's notice. Accordingly, having given notice of termination in May of 2000, Mattel terminated the lease in May of 2001.

contends that Mattel is liable for cleanup and third party litigation costs.

History

The relevant history surrounding the premises began more than 50 years ago, when Sawyer's, Inc., owned the property and began a toy manufacturing facility on the site.[2] Sawyer's was acquired by GAF Corporation in 1967, which continued the toy manufacturing operations. GAF eventually sold the premises to View-Master in 1981, which operated a similar toy operation on the site. In 1983, View-Master sold the property to Western International Properties, but then leased back the property from Western to continue its operations. In 1984, Western subdivided the property and sold the relevant portion of the property to John Eyler. Mr. Eyler then conveyed the property to Cascade Square Associates in 1985. In 1989, while View-Master was still leasing the property, View-Master was acquired by Tyco.[3] Mattel acquired Tyco in 1997. Finally, in 1998, Cascade transferred its ownership interest in the property to Hall Street. The current action is primarily between Hall Street and Mattel, as successors in interest.

The Lease Agreements

On March 5, 1991, View-Master entered into a Lease Agreement (the "Lease") with Cascade Square Associates, pursuant to which Cascade Square Associates agreed to lease the premises to View-Master.[4] The Lease was negotiated by Robert Hibbs, an attorney and partner for Cascade, and

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[2] At that time, the property was separated into three parcels: parcels 1, 2 and 3. The only parcel relevant to this action is parcel 1, and I therefore discuss parcel 1 in this opinion.

[3] Tyco refers collectively to Tyco Industries, Inc., Tyco Manufacturing Corporation and Tyco Toys, Inc.

[4] The Lease was substantially similar to the original lease executed on June 1, 1985 and containing the same basic rights and responsibilities.

Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. The Lease provided that View-Master would lease the property for commercial purposes for a term of approximately six years. Because View-Master and its predecessors had used the property and operated its facilities for many years, they were generally more familiar with the condition of the property than Cascade. Accordingly, the Lease provided that with certain limited exceptions, View-Master would indemnify Cascade for any activities undertaken by it or its predecessors on the property.

On April 29, 1996, Cascade Square Associates and View-Master executed an amended lease (the "Amended Lease"), which was substantially similar to the 1991 lease. After acquiring Tyco, Mattel became the tenant under the Amended Lease in 1997. Mattel informed Hall Street in May of 2000 that it intended to terminate its lease, and the lease was terminated on May 31, 2001.

Environmental Issues on the Property

In 1950, a well and water tower were installed on the property to supply water to the facility. Thereafter, between 1951 and 1980, Sawyers, Inc. and GAF used trichloroethene ("TCE") in its toy manufacturing operations. While most of the work with TCE was done on the surrounding areas of the property, and not the property at issue in this action, Sawyers/GAF did dispose of sanitary wastes through a septic tank and drainfield located at the north end of the property. There is no evidence that any party used TCE in any operations on the property after 1981. It is undisputed that neither Mattel nor any of its predecessors, however, ever tested the well water, groundwater or shallow soils for contaminants.

In March of 1998, Hall Street commissioned SECOR, an environmental consultant, to test the property's well water for pollutants. SECOR discovered that the water contained TCE

levels that far exceeded the federal maximum allowable level.[5] Upon this discovery, the Oregon Department of Environmental Quality ("DEQ") began investigating the contamination and planning remedial measures. The DEQ's investigations revealed additional contaminants, including petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was discovered on the property as well as its adjacent parcels, and was found in the well water, the shallow soil, the groundwater and the deep aquifer underlying the property. Upon discovery of the extensive contamination at the site, Mattel shut down the well. The shutdown continues today.

In November of 1998, Mattel and GAF entered into a consent order with the DEQ, pursuant to which GAF agreed to investigate the environmental conditions of the property and Mattel agreed to provide public outreach and communications to its employees. As part of the site investigation, the DEQ performed a risk assessment ("RA") to evaluate the levels of contaminants and the dangers they posed. The RA identified current and future risks at the site:

> 1) Unacceptable risks from TCE in the deep aquifer underlying the property, if that source is used for drinking water; and 2) Unacceptable risk from TCE in the drainfield area, primarily faced by trench workers performing excavation in that area who may be exposed to shallow groundwater. In addition, petroleum hydrocarbons were identified in the soil located under certain buildings on the property. The DEQ found that the hydrocarbons pose no threat as long as the buildings remain, but noted that if the buildings were ever removed, the hydrocarbons in the soil would have to be treated.

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[5] The Federal Drinking Water Standard for TCE is 5 micrograms per liter (ug/l). The well water on the property purportedly contained TCE in concentrations of 1220 to 1520 ug/1.

On October 29, 2001, the DEQ issued its Recommended Remedial Action Staff Report for the Property. Thereafter, G-1 Holdings, the successor to GAF, undertook the investigation and cleanup on the property. The DEQ is currently supervising the remedial work being performed by G-1 holdings.

Repair Issues on the Property

In the arbitrator's decision, he found that Mattel and its predecessors had "failed to repair and maintain the Property as required by Section 8(a) prior to 2000." See Arbitrator's Findings of Fact and Conclusions of Law ("FFCL"), at ¶ 35. The arbitrator also found, however, that Mattel did initiate repair efforts in 2000, in preparation for terminating the Amended Lease. Mattel offered to pay Hall Street the cost of the necessary repairs, in lieu of performing them, but Hall Street refused. Mattel then proceeded with the repair work, keeping Hall Street apprized of the progress of the work with regular status reports. The City of Beaverton eventually inspected and approved Mattel's repair work. Mattel spent in excess of one million dollars in repairs on the property, and in its final inspections of the property before relinquishing control to Hall Street, it determined that the structures were in good condition, the roofs were leak-proof, and all the mechanical, electrical, water and other equipment, pipes, fixtures, pavement and systems were in good working order. The evidence indicates that Hall Street presented no evidence regarding the condition of the property when View-Master began its lease, and did not inspect Mattel's repair work while it was being performed.[6]

[6] In its motion to vacate, Hall Street does not challenge the arbitrator's decision with respect to Mattel's repair efforts.

Third Party Lawsuits

After the contamination was discovered, former employees of Tyco brought suit against Hall Street and Cascade for injuries allegedly caused by their negligence in permitting and/or not detecting the TCE contamination. These cases are identified as Keith, Phelps and Schiffer. They were eventually dismissed for lack of proof of any injury caused by the condition of the property. In a fourth action, the Christopherson case, the daughter of a Tyco worker brought suit against GAF, Hall Street and Mattel, also for injuries allegedly caused by the TCE contamination at the site. This case, too, was dismissed for inadequate proof of injury, and Mattel has paid all costs incurred in litigating this action.

Hall Street initiated the instant action on March 10, 2000. Its complaint raised three general issues: 1) Whether Mattel could legitimately terminate its lease on May 31, 2001, if it provided one year's notice of termination; 2) Whether Mattel was obligated to indemnify Hall Street for costs related to environmental cleanup; and 3) Whether Mattel was obligated to indemnify Hall Street for expenses it incurred in defending itself against third party lawsuits.

The first issue was resolved by a bench trial to this court on April 27, 2001. The remaining issues were resolved in an arbitration held on December 12-14, 2001, in which the arbitrator found generally in favor of Mattel. He concluded that Mattel was not obligated to indemnify Hall Street either for environmental cleanup costs or for third party lawsuits.[7] In a second opinion, the arbitrator ordered Hall Street to pay Mattel for costs and fees incurred in litigating this action, in the sum of $441,545.58.

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[7] The arbitrator did order Mattel to pay Hall Street $130,000 for Mattel's liability for the TPH contamination under buildings on the property, but Mattel had already agreed to pay this amount.

STANDARD OF REVIEW

Typically, arbitration awards are given substantial deference and will not be set aside unless the arbitrator acted in manifest disregard of the law. Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) ("Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court . . . will not set it aside for error, either in law or fact . . . . An arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law'"). Parties are free, however, to draft a contract that sets rules for arbitration and dictates an alternative standard of review. See, e.g., LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997) ("Federal courts can expand their review of an arbitration award beyond the FAA's grounds, when . . . the parties have so agreed"). An intent to specify an alternative standard must be clearly expressed. *Id.*

In this case, the parties drafted an Arbitration Agreement that set the rules for arbitration. Paragraph 27 of the Rules for Arbitration set forth the applicable standard of review: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Thus, the court must review the arbitrator's findings of fact for substantial evidence, and his conclusions of law for error.

DISCUSSION

I. Plaintiff's Motion to Vacate, Modify or Correct Arbitration Award

Following arbitration, the arbitrator issued two separate opinions in this action. First, on January 2, 2002, he issued

findings of fact and conclusions of law in which he found for Mattel as to liability (the "January 2 findings"). Second, on January 29, 2002, he issued findings of fact and conclusions of law in which he awarded fees and costs to Mattel ("January 29 findings"). Hall Street filed its motion to vacate, modify and/or correct the arbitration award on February 2, 2002, challenging both the January 2 findings and the January 29 findings.

A. Liability

In his January 2 findings, the arbitrator reached three basic conclusions with respect to Mattel's liability to Hall Street: 1) Mattel is not liable for environmental cleanup costs because Hall Street has suffered no loss, and even if it had, Mattel remained in compliance with "applicable environmental laws" as required by the Amended Lease; 2) Mattel satisfied all of its repair and maintenance obligations under the Amended Lease prior to its termination; and 3) to the extent it was liable, Mattel fully indemnified Hall Street for the third-party lawsuits brought against Hall Street. In its motion to vacate, Hall Street challenges (1) and (3) above.

1. Timeliness

At the outset, Mattel contends that to the extent Hall Street's motion challenges the arbitrator's findings on the issue of liability, it is time-barred under the Arbitration Agreement because it was filed more than 15 days after the opinion on liability was issued, on January 2, 2002. Hall Street responds that its motion to vacate was filed as a combined motion to challenge both the arbitrator's decision on liability and the decision on attorneys' fees. The arbitrator issued his findings on the fees issue on January 29, 2002. Hall Street filed its motion to vacate both decisions on February 13, 2002.

There is no question that parties consenting to arbitration can stipulate a time period within which any challenge to the arbitrator's decision must be filed. See, e.g., Sheet Metal

Workers' Int'l Assoc., Local No. 252 v. Standard Sheet Metal, Inc., 699 F.2d 481, 482-83 (9th Cir. 1983). Mattel contends that the Arbitration Agreement unambiguously provides that any motion challenging any decision of the arbitrator must be challenged within 15 days of its issuance. In support, it cites paragraph 3 of the parties' Arbitration Agreement, which provides:

> The arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law.[8] Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling.

Paragraph 3 does not define the specific "decision" that may be reviewed upon a subsequent motion. Mattel contends that the best reading of this provision is that each "decision" issued by the arbitrator must itself be challenged within 15 days of its issuance. Under this interpretation, Hall Street would have to challenge the liability decision and the fees decision in separate motions, each filed less than 15 days after the decisions were issued.

In further support of this view, Mattel cites 1) paragraph 22 of the Rules of Arbitration, which refers to a decision on the issue of fees as "supplemental" to the underlying decision on the merits, and 2) the "uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final," Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200-02 (1988), and 3) Fed. R. Civ. P. 54(d)(2)(C), which states that an award of fees should be "set forth in a separate document." Relying on the Arbitration Agreement and the relevant law, Mattel

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[8] By stipulation of the parties, the December 30, 2001 deadline was extended to allow the arbitrator to issue his decision on the merits no later than December 31, 2001 and a decision on the issue of fees no later than January 28, 2002.

argues that the Arbitration Agreement is unambiguous, permits no consideration of extrinsic evidence, and mandates the conclusion that the motion to vacate is untimely to the extent it challenges the January 2 FFCL.

Hall Street correctly points out, however, that several provisions of the Arbitration Agreement support the conclusion that a single motion challenging any and all conclusions reached by the arbitrator was intended. First, paragraph 3, relied on heavily by Mattel, states that the arbitrator shall decide "the arbitration," implying that he will issue one comprehensive opinion that may then be challenged by the losing party. Paragraph 1 of the Arbitration Agreement states that the parties "agree to arbitrate before one arbitrator all remaining issues." Paragraph 1 itself then refers to paragraph 27, which permits this court to "enter judgment upon any *award* either by confirming the *award* or by vacating, modifying or correcting the *award*" (emphasis added). In other places in the Arbitration Agreement, including paragraphs 7 and 19, the arbitrator's final decision is referred to as an "award" as well. Relying on these provisions, Hall Street contends that the Arbitration Agreement on this issue is, at the very least, ambiguous, and permits consideration of outside evidence.

Oregon law provides that in order for a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. Hoyt Street Properties, L.L.C. v. Burlington Northern & Santa Fe Ry. Co., 38 F.Supp.2d 1185 (D. Or. 1999). In this case, in light of the use of "award" and "decision" in separate provisions of the Arbitration Agreement, both parties have probably put forth plausible interpretations of the contract, and the court therefore finds that it is ambiguous.

Finding an ambiguity on this issue permits the court to consult extrinsic evidence to shed light on what was intended

by the parties. Hall Street cites two pieces of outside evidence to support its claim that the parties intended that a final decision by the arbitrator resolving all issues in the case would be challenged in a single motion. First, it cites a January 2, 2002 letter written by the arbitrator, in which the arbitrator indicates that he will issue one comprehensive "award" that may then be challenged here. In the January 2 letter, the arbitrator stated that "once the attorney fees and costs are resolved, I will issue the Arbitration Award," While this letter certainly does not, on its own, evidence the view of the parties, the lack of response or clarification by Mattel indicates that its understanding was not inconsistent. Second, it contends that the parties initially intended that the arbitrator would issue one final decision on all issues no later than December 30, 2001. When it became apparent that the arbitrator would not meet this deadline, the parties apparently agreed to extend the deadline to December 31, 2001, for the decision on the merits, and January 28, 2001, for the decision on fees. At the time the extension was discussed, Hall Street states that the parties neither envisioned nor discussed a requirement that the decisions be challenged in separate motions. The extrinsic evidence thus indicates that to the extent it was considered, the parties intended that the arbitrator would issue one "award," which could then be challenged in a single motion within 15 days.

As the court has discussed, there are persuasive arguments to the contrary. On the whole, however, the Arbitration Agreement and the facts support Hall Street's argument that its Motion to Vacate was timely filed. In light of the parties' substantial interests at stake in this case, it would be extraordinary to deny either party its right to judicial review on the basis of a disputable filing deadline, the alleged violation of which prejudiced no one. Given these considerations and the discussion above, the court concludes that Hall Street's Motion was timely filed.

2. The Merits

The key issue before me is whether the arbitrator erred in concluding that Mattel was in compliance with applicable environmental laws while leasing the property, and therefore was not liable to Hall Street for environmental cleanup costs. Under the lease, because Mattel and its predecessors, especially View-Master, were most familiar with the condition and operations at the property, they were obligated under the Lease to indemnify Hall Street for Mattel's and its predecessors' activities at the site. Section 6.3 of the original lease, for example, provided as follows: "Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising oat of or related to any action or inaction of Tenant, its employees, agents or invitees or any condition of the Property." Other provisions of the original lease were consistent with this clause:

- Section 5(b): Tenant must comply with "all applicable laws, rules and regulations of any public authority";
- Section 12(a): "Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes]";
- Section 12(b): "Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances. . . . Tenant assumes liability for the use or presence . . . of any hazardous waste. . . . Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and defend Landlord, its officers, agents, and employees, against

> and from any and all losses, costs, damages, expenses . . . or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials."

These provisions consistently impose a duty on Mattel to indemnify Hall Street for costs associated with environmental damage, and neither party disputes that this was the general rule under all of the lease agreements.

There was an exception to Mattel's duty to indemnify, however, found in section 12(c) of the Lease. Section 12(c) provided:

> To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b above, Tenant shall not be held liable following the expiration of this Lease term for the following . . . (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

A similar provision conditionally excepting the tenant's liability is found in section 13(a) of the lease agreements.

In the January 2 findings, the arbitrator found that "Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13a have been met." See January 2, 2002 findings, p. 16 at ¶ 5. The arbitrator acknowledged that Mattel and its predecessors failed to test for TCE contamination at the site, constituting a violation of O.R.S. § 448 and O.A.R. § 333-061, but concluded that these provisions were not "applicable environmental laws." He stated that these sections were not applicable because they were designed to target the specific harm of injury to end users caused by contaminated drinking

water, and not potential economic injury to a private landowner. He noted that the law is administered by the Oregon Health Division of the Department of Resources. Citing no specific provision of the lease, the arbitrator reasoned that "as far as the Lease is concerned, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination." January 2 findings at ¶ 7, pp. 16-17. Relying on this conclusion, the arbitrator found that Mattel had remained in compliance with applicable environmental laws, thereby meeting the exception to its general duty to indemnify found in sections 12(c) and 13(a) of the Lease. Hall Street contends that this conclusion was in error.[9]

After careful consideration, I conclude that Mattel's failure to test the water for contaminants was in fact a violation of "applicable environmental laws" within the meaning of the lease. Several considerations lead me to this conclusion. Generally, an analysis of the lease Makes clear that it was written to impose broad liability on the tenant for any environmental damage on the property. The two exceptions to this liability, found in sections 12(c) and 13 of the lease, freed the tenant from liability *only* if it was in compliance with all "applicable environmental laws."

The arbitrator's contrary reasoning—that Oregon's Drinking Water Quality Act ("ODWQA") does not constitute "applicable environmental laws" because "these health provisions are designed to protect a specific type of injury, i.e., health injury to people from drinking the water, and are

[9] Hall Street also contends that Mattel violated applicable environmental laws by discharging TCE-contaminated water into the storm and sanitary sewer systems. Based on the information before the court, it appears that this was not properly submitted to the arbitrator, who made no finding on this issue, and the court therefore declines to reach the issue here.

not designed to protect landowners from having their property protected from environmental contamination"—is an overly restrictive construction of "applicable environmental laws" that is not warranted by the language of the lease. The Act is certainly "applicable" to Mattel, as the tenant on the property. Further, while the Act is administered by the Oregon Health Division, along with the DEQ, this does not necessarily indicate that the Act is not also an environmental law. The Act is the Oregon counterpart to the Federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, which is generally considered an environmental law. See, e.g., In re Willy, 831 F.2d 545, 546 (5th Cir. 1987); 323-343 E. 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 685 n21 (D.D.C. 1995); Roe v. Wert, 706 F. Supp. 788, 791 (W.D. Okla. 1989). Its purpose—"to protect the public health through insuring safe drinking water within a water system"—is complementary to the goals of most environmental statutes. The Clean Air Act, for example, is designed "to promote the public health and welfare and the productive capacity of the population." See 42 U.S.C. 7401(b)(1). See also Toxic Substances Control Act, 15 U.S.C. §§ 2601(b)(1) (noting that the goal of the TSCA is to "regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment"). In fact, the environmental component of the ODWQA is undeniable: the Act protects the public from potential health hazards resulting from environmental damage. Significantly, Mattel does not dispute the general conclusion that the ODWQA is, standing alone, an environmental law.

Instead, Mattel contends that the arbitrator was correct in concluding that the Act is not "applicable," because the Act is "a statute administered by the Health Department for the express purpose of protecting the public from tainted drinking water" and not "an applicable environmental statute designed to protect Hall Street from the property damage." See Mattel's Memorandum in Opposition, p. 22. This reasoning,

however, defies logic. *No* environmental statute advances such a purpose; the *purpose* of such statutes is to protect the environment and human health.

Mattel also argues that even were the Act "applicable" to Mattel within the meaning of the lease, its violation of the Act resulted in no loss to Hall Street, and therefore cannot be a basis for Mattel's liability to Hall Street. I reject this argument for two reasons. First, there is no requirement in the lease that there be actual causation of loss. The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation that it can avoid only if it complies with all applicable environmental laws.[10]

Furthermore, even were the arbitrator correct in his conclusion that there is a causation requirement in the lease, the third party lawsuits filed against Hall Street could in fact constitute loss caused by Mattel's violations. While it is true that the Phelps, Schiffer and Keith cases alleged negligence only against Hall Street, had Mattel tested the water and ceased its use, the lawsuits arguably would not have been filed. At the very least, the existence of such suits creates a factual issue to be addressed on remand as to whether there is loss resulting from Mattel's violation.

In sum, the arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute

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[10] Mattel contends that the arbitrator concluded that there must be causal link between the alleged violation of applicable environmental laws and any losses incurred by Hall Street, and that this conclusion is entitled to deference because it rests on a factual determination of the parties' intent in the lease. The arbitrator does not explicitly reach this conclusion, however. Furthermore, to the extent the arbitrator reaches this conclusion implicitly, he cites no provision of the lease in support and does not discuss any reasoning for drawing such a conclusion. In the face of a rather clear contract provision, which imposes liability simply if Mattel violates "applicable environmental laws," such a conclusion devoid of reasoning or support is not entitled to substantial deference.

a violation of applicable environmental laws. Accordingly, this case is remanded to the arbitrator for further consideration in accordance with this opinion.

3. Mattel's Contingent Appeal

Finally, Mattel "contingently" appeals the arbitrator's finding that GAF and G-1 Holdings were Mattels' predecessors-in-interest and that Mattel is therefore liable under the lease for their contamination. In his January 2 findings, the arbitrator concluded that when the original lease was executed by View-Master as the tenant, View-Master's consent to indemnify the landlord for the acts of its predecessors must necessarily include GAF and Sawyers, because there were no other predecessors to View-Master with respect to the property. The arbitrator stated:

> The term "predecessors-in-interest," as used in Section 13a, includes Sawyers and GAF. The term would otherwise be meaningless since View-Master, the tenant under the Lease, had no other predecessors-in-interest Therefore, Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease.

January 2 findings, p. 15 at ¶ 4c.

Mattel contends that the arbitrator's conclusion was in error, because he incorrectly found that GAF and Sawyers were the only potential predecessors to View-Master at the time the original lease was executed. It asserts that the View-Master entity that executed the original lease was the successor to a previous View-Master entity that owned the property after GAF and Sawyers. It also cites the testimony of Michael Kennedy, negotiating the leases on behalf of Tyco, who stated that he did not intend the term predecessor-in-interest to include GAF and Sawyers. According to Mattel, there is no testimony to the contrary by any representative of Hall Street or Cascade.

From a review of the arbitrator's decision, it appears that the arbitrator did not review substantial evidence relevant to the parties' intent in construing the term predecessors-in-interest. He states, simply, that the term includes GAF and Sawyers because "[t]he term would otherwise have no meaning," yet he does not mention Mattel's assertion that a previous View-Master entity occupied and oversaw operations on the property. He does not discuss the relationship between GAF and Sawyers on the one hand and Mattel on the other, which is clearly significant in determining whether GAF and Sawyers are actual predecessors or merely prior owners of the property. Finally, he does not address the testimony of Michael Kennedy, who stated that his intent as a negotiator of the lease was to include only the previous View-Master entity as a predecessor in interest. In light of the substantial amount of evidence that is not addressed in the arbitrator's decision, the court is unable to determine whether he considered this substantial evidence and therefore whether his conclusion on this issue is warranted. Accordingly, on remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term "predecessor-in-interest" in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record.

B. Attorneys' Fees and Costs

Based on the conclusions reached in this opinion, the arbitrator's decision awarding fees and costs to Mattel as the prevailing party is hereby vacated. Once the underlying issues of liability and damages are resolved, the arbitrator may then revisit the issue of fees.

II. Plaintiff's Motion to Strike

Plaintiff also filed a motion to strike Mattel's "supplemental authority" (# 79). In light of the conclusions reached in the court's opinion on plaintiff's motion to vacate, plaintiffs motion to strike is denied as moot.

CONCLUSION

Plaintiffs Motion to Vacate (# 70) is GRANTED and this case is remanded to the arbitrator for further consideration in accordance with this opinion. Plaintiff's Motion to Strike (# 79) is DENIED as moot.

DATED this 29th day of April, 2002.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, an Oregon corporation,
Defendants.

AMENDED ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

THIS MATTER is before the arbitrator on remand from the U.S. District Court for the District of Oregon. U.S. District Judge Robert E. Jones issued his Opinion and Order, dated April 29, 2002, and concluded as follows:

1. The arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute a violation of applicable environmental laws. Accordingly, this case is remanded to the arbitrator for further consideration in accordance with this opinion.
2. On remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term "predecessors-in-interest" in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record.

3. The arbitrator's decision awarding fees and costs to Mattel as the prevailing party is hereby vacated. Once the underlying issues of liability and damages are resolved, the arbitrator may then revisit the issue of fees.

Following oral argument on remand on August 20, 2002, the arbitrator took this matter under advisement. After further review of the record in light of Judge Jones' Opinion and Order, the following Amended Findings of Fact and Conclusions of Law are hereby entered:

AMENDED FINDINGS OF FACT

1. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is a Washington limited liability company and is the owner of certain property in Washington County, Oregon, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Property"). Cascade Square Associates ("Cascade") is the Sole principal of Hall Street and its predecessor-in-interest.

2. Defendant Mattel, Inc.. ("Mattel") is a Delaware corporation doing business in Oregon. Its "predecessors-in-interest," as that term is commonly understood, but without regard to the "Lease" referred to below, are View-Master International Group, Inc., and View-Master Ideal Group (collectively "View-Master"); and Tyco Industries, Inc., Tyco Manufacturing Corporation, and Tyco Toys, Inc. ("collectively "Tyco").

History of the Property

3. The Property was once a part of a larger, 50-acre L-shaped property. The larger property consisted of three distinct parcels, known as Parcels 1, 2, and 3.

4. From 1951 to 1967, Sawyers, Inc. ("Sawyers") owned Parcels 1, 2, and 3, and operated a toy manufacturing facility.

5. In 1967, GAF acquired Sawyers and continued operations at the site as a toy manufacturing facility.

6. In 1979, GAF sold Parcel 3 to the Southern Pacific Industrial Development Company.

7. In 1981, GAF sold Parcels 1 and 2 and the toy manufacturing business to View-Master International Group.

8. View-Master International Group owned and operated Parcels 1 and 2 from approximately 1981 to 1983 as a toy manufacturing facility.

9. In 1983, View-Master International Group sold Parcels 1 and 2 to Western International Properties (also known as Western Industrial Properties), but leased back Parcel 1 to continue its toy manufacturing activities.

10. In 1984, Western International Properties subdivided Parcel 1, with the northwest corner sold to Commercial Real Estate Company, which redeveloped it as an office building. The remaining portion of Parcel 1 (the "Property") and the lease to View-Master International Group was sold to John Eyler in 1984. Mr. Eyler subsequently conveyed Parcel 1 and the lease to View-Master International Group to Cascade in 1985.

11. In 1987, View-Master International Group became View-Master Ideal Group.

12. In 1989, Tyco acquired the assets of View-Master Ideal Group, which remained a subsidiary of Tyco.

13. In 1997, Mattel acquired Tyco.

14. In 1998, Cascade transferred its ownership interest in the Property to Hall Street.

15. On May 31, 2000, Mattel sent Hall Street a Notice of Termination informing Hall Street that it was terminating the lease effective May 31, 2001, almost two years prior to the scheduled lease termination date in 2003. At an earlier stage of this litigation, Hall Street alleged that Mattel's early termination of the lease term was not permitted under the

terms of the lease. Judge Jones bifurcated that issue from the issues in this arbitration and, after a two-day bench trial, concluded that Mattel's termination did not violate the agreement. Accordingly, Mattel's early termination of the lease is not an issue in this arbitration.

16. The Lease terminated and Mattel vacated the Property on May 31, 2001. Except for remediation efforts, the Property remains unoccupied.

The Lease

17. On March 5, 1991, View-Master entered into a Lease Agreement with Cascade for the Property (the "Lease"). On April 26, 1996, Cascade and View-Master executed a First Amendment to the Lease, which, among other items, extended the term of the Lease.

18. The Lease was negotiated by Robert Hibbs, an attorney and partner of Cascade, for the Landlord, and Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. Both parties participated in drafting certain portions of the Lease.

19. The Lease was negotiated in the context that View-Master was the only party with intimate knowledge of the property and would, therefore, indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease of June 1, 1985, with limited exceptions.

20. The Lease replaced the Original Lease dated June 1, 1985, which had provided in Section 6.3 as follows:

> **"Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising out of or related** to any action or inaction of Tenant, its employees, agents or invitees or **any condition of the Property."** (Emphasis added.)

21. The recitals to the Lease provide as follows:

> **"B. View-Master designed and constructed the Premises as a toy manufacturing facility at a time when it owned the underlying real property. View-Master has been the only party to occupy or conduct business on the Premises. View-Master-continued to lease the Premises from Landlord pursuant to the Original Lease which provided that View-Master indemnified Landlord for its actions with respect to the Premises or any condition of the Premises. The parties intended that such indemnity applied to** Tenant's actions in constructing the Premises, including its choice of building materials, and **all activities with respect to the Premises whether or not they occurred before the date of the Original Lease.**
>
> **C. In Executing this Lease, the parties intend that Tenant shall assume View-Master's obligation to indemnify Landlord under the Original Lease, which indemnity obligation shall survive termination of the Original Lease, and intend that Tenant shall indemnify Landlord for any actual or potential liability Landlord may be exposed to as a result Of Tenant's future actions with respect to the Premises. Because the Premises are a self-contained manufacturing facility constructed and previously owned by View-Master, and because the Original Lease was on a triple net basis, Landlord has not been actively involved in managing the Premises and relied on View-Master's agreement to indemnify Landlord for its actions."** (Emphasis added.)

22. In addition, the Lease contains the following relevant sections:

a. Section 5.b. provides, in pertinent part:

> **". . . , Tenant shall comply at its expense with all applicable laws, rules and regulations of any public**

authority, including but not limited to those **regarding maintenance, operation, and use of the Premises, use of machinery and signs on the Premises,** and those regarding discharging hazardous materials or any other waste." (Emphasis added.)

b. Section 5.c. provides, in pertinent part:

"Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises or Landlord's adjoining property, or are reasonably offensive to Landlord, or other owners or users of adjoining property."

c. Section 8.a. provides:

"Maintenance of the Premise. **Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises, including without limitation the** heating, ventilating, air conditioning, mechanical, electrical, elevator, and plumbing systems, **structural roof, walls, and foundations,** the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas **as and when required or requested by any governmental agency or when needed to preserve them in good repair, operating condition, Working order and good appearances, and regardless of whether the repairs are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. All such repairs will be in quality and. Class equal to the original work or installations."** (Emphasis added.)

d. Section 12.a. provides, in pertinent part:

"Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises, including but not limited to the Resource Conservation and Recovery Act, as amended

(RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes] . . . whether occurring before the Lease Commencement Date, or during the Lease term." (Emphasis added.)

e. Section 12.b. provides:

"Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances as herein defined on the Premises. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, Tenant assumes liability for the use or presence in the Building materials or on or about the Premises of any hazardous waste including but not limited to asbestos or lead. **Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs) or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials.** Subject to the conditions of Section 12.c. below, this provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision or the Premises are vacated by Tenant." (Emphasis added.)

f. Section 12.c. provides, in pertinent part:

"To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b. above, Tenant

shall not be held liable following the expiration of this Lease term for the following: . . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

g. Section 12.d. provides:

"Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following: . . .

(b) Any substance defined as "hazardous substance," "hazardous material," or "toxic substance" in:

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state, or local law or regulation now or hereafter in effect."

h. Section 13.a. provides:

"Indemnification. Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors **in or about the Building or Premises as a result of any act, omission or negligence of Tenant or its** officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors, **whether occurring in** the construction of or choice of building materials for the Building, **occurring during or prior to the Original Lease [or] during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant.**

In the event that Landlord is sued for failure to comply with local, state or federal environmental laws and/or regulations regarding the Premises, and it is alleged the spill or violation occurred over a number of years, some portion of which time is outside of the term of this Lease or the Original Lease, then Landlord shall agree to seek to have the other tenants (whether. prior or subsequent to the Lease or Original Lease), pay for their prorated amount of Landlord's defense costs in such suit. Tenant's obligation to defend shall not be delayed but shall be limited to its allocable portion of such defense costs. Landlord, upon learning of a suit or a potential suit against it under this paragraph shall notify Tenant thereof (the "Notice"). During the following thirty (30) days from such notice the parties shall attempt to negotiate a fair and reasonable allocation of defense costs to be paid by Tenant for such action, based

on Tenant's actual contribution to the damages which are the subject of such suit. . . .

To the extent Tenant has been in compliance with applicable environmental laws, notwithstanding the foregoing language in Section 13.a. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. . . .

(iv) Any other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc. . . .

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building.

The foregoing provisions shall not be construed to make Tenant responsible for loss, damage, liability or expense resulting from injuries to third parties to the extent caused by the intentional or negligent acts of Landlord, or its officers, contractors, licensees, agents, or employees." (Emphasis added.)

i. Section 20 provides, in pertinent part:

"[U]pon expiration of the term of this Lease, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys

thereto, to Landlord in as good condition as when received by View-Master from Landlord under the Original Lease or as thereafter improved, reasonable use, wear and tear excepted."

j. Section 31 provides:

"The Premises and Landlord's adjoining property are both served by a drainage system which consists of open grates and underground sewers and catch basins. Tenant shall maintain in good condition and repair the portion of such system on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

k. Section 32 provides:

"The Premises and Landlord's adjoining property are both served by one unified sanitary sewer system. Tenant shall be responsible for maintaining in good condition and repair the portion of such system located on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

l. Section 33.h. provides, in pertinent part:

". . . . Landlord further covenants and warrants that at all times during the term hereof, provided Tenant is not in default, Tenant will have full, peaceful and quiet enjoyment of the Premises for the purposes and uses set forth in this Lease."

23. During the negotiations, View-Master asked Cascade to remove the terms "predecessors-in-interest" and "or prior to the Original Lease" from Section 13.a., noting that the language could be construed to refer to Sawyers and GAF and that "the prospect of indemnifying Landlord from acts of

GAF, Sawyers, or others is unfair." Pls. Arb. Exh. 30 and Defs. Arb. Exh. 162. Cascade refused to remove these terms or to substitute' VMIG ("View-Master International Group, Inc.") for "predecessors-in-interest," but did agree to add other language to Section 13.a. limiting View-Master's liability if certain conditions were met. View-Master also asked Cascade to remove the word "tenants" from the seventh line of the second paragraph of Section 13 and replace it with the words "owners or occupants." Again, Cascade refused. Despite those refusals, View-Master signed the Lease.

24. Michael Kennedy and Dennis Wesolowski, in their testimony and narrative statements, make clear that View-Master intended "predecessors-in-interest" to refer to View-Master International Group, Inc. Mr. Kennedy's internal communication of February 8, 1991, supports this view. See Defs. Arb. Exh. 163. Robert Hibbs offered no testimony on this point.

Environmental Issues at the Property

25. From approximately 1951 to 1980, GAF/Sawyers used trichloroethene ("TCE") to remove grease from metal parts. The degreasing operations occurred in a building on Parcel 2, where TCE contamination of the shallow groundwater is found today. GAF/Sawyers also disposed of sanitary wastes via a septic tank and drainfield located at the north end of Parcel 1, where shallow groundwater contamination is also found today. Spills of TCE by GAF/Sawyers occurred at the degreasing location and other areas. Drums of degreaser wastes were dumped on Parcel 3 by GAF/Sawyers. There is no evidence of TCE use at the facility after GAF sold the Property in 1981.

26. The well and water tower on Parcel 1 were installed in 1950. The on-site well supplied facility water.

27. During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants.

28. In March 1998, during testing performed at the instance of Hall Street by SECOR, an environmental consultant, water from the well was discovered to contain TCE at levels far in excess of the federal maximum allowable level. Efforts were initiated under the auspices of the Oregon Department of Environmental Quality ("DEQ") to investigate the environmental contamination problem and plan remedial efforts. Those investigations revealed contamination of the Property and adjacent parcels by several types of contaminants, including TCE, petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was determined to exist not only in the on-site well, but also in the shallow soil, groundwater, and deep aquifer underlying the Property.

29. Mattel shut down the well upon discovery of the contamination. This shutdown is permanent and Hall Street has lost any water rights it had.

30. There is insufficient evidence to prove that Mattel's use of the well after 1981 circulated TCE and resulted in additional contamination of the shallow soil and groundwater.

31. There is insufficient evidence to prove that the condition of certain pipes after 1981 resulted in TCE leaks and additional contamination of the shallow soil and groundwater.

32. In November 1998, Mattel and GAF entered into a consent order with DEQ. GAF agreed to investigate the environmental conditions of the Property, and Mattel agreed to provide public outreach and communications to the employees. Interim cleanup actions to address areas of immediate concern were completed during the Summer of 2001.

33. As part of the site investigation, a risk assessment was performed under DEQ's direction to evaluate all contami-

nants at all areas. The risk assessment identified current and future risks at the site in two locations. First, unacceptable risk was identified from TCE in the deep aquifer if that source is to be used as drink water. The risk assessment also identified possible impact to ecological receptors in the wetland, if untreated water from the deep groundwater were ever to be pumped to the surface and discharged.

34. Second, unacceptable risk was identified from TCE in the shallow groundwater located at Parcel 2 in the location of spills from GAF/Sawyers at the degreasing machine area and at Parcel 1 in the GAF/Sawyers drainfield area. This risk was limited to trench workers who may be exposed to shallow groundwater in those areas, should there be any excavation of those areas in the future. The shallow groundwater in all other areas of the Property have only low levels of TCE and other associated compounds present, and therefore no current or future remediation or special conditions are necessary.

35. Petroleum hydrocarbons were also identified in the soil located under Buildings 400 and 800/900 that were used by both GAF and View-Master for injection molding machines and boilers. Because the hydrocarbons capped by the building are immobile, and have low toxicity, DEQ has found that the hydrocarbons are posing no risk and is not requiring their remediation. However, if the buildings were ever removed, and the soil was subsequently disturbed, the hydrocarbons in the soil must, under DEQ's direction, be properly treated.

36. The contaminants in the soil in the remainder of Parcel 1 are below residential cleanup standards; therefore, no current or future remediation or special conditions are necessary as to the shallow soil.

37. The investigation and cleanup of contamination at the Property, to the extent required by DEQ, is being addressed by G-1 Holdings, the successor to GAF, under DEQ's

supervision. On October 29, 2001, DEQ issued its Recommended Remedial Action Staff Report for the Property. If G-1 Holdings fails to pay the costs associated with the investigation and cleanup of contamination at the Property, Hall Street is potentially liable for those costs as the owner.

38. Damages:

(a) TCE contamination to shallow soils and shallow groundwater: Hall Street presented evidence that they were damaged in the sum of $2,558,101.00 for the cost of dewatering and remediation of the contaminated shallow groundwater underlying Buildings 800/900 and 1100/1150, and in the sum of $150,000.00 to complete a site characterization and investigation for purposes of remedial engineering. Mattel presented evidence that only the sum of $9,000.00 need be expended to provide dewatering to protect trench workers.

(b) Loss of water rights: The water rights were non-transferable. Hall Street argues for damages of $8,200,000.00 based upon the cost of replacement water over a 20-year period. Mattel argues that the proper measure of damages is the diminution in value of the Property or of the lease value. Hall Street presented no evidence regarding diminution of value.

(c) Environmental consulting services: Hall Street incurred costs for environmental consulting services performed by Dames & Moore/URS in the sum of $143,630.52.

(d) Legal services in connection with environmental issues: Hall Street incurred costs for legal services rendered by Short, Cressman and Burgess in the sum of $216,036.59.

Repair Issues

39. In general, View-Master, Tyco, and Mattel failed to repair and maintain the Property as required by Section 8.a. prior to 2000.

40. In preparation for terminating the Lease and vacating the Property, Mattel engaged in an extensive program to assess and repair the facility.

41. Mattel offered to pay the Landlord the cost of repair, in lieu of performing them, if the Landlord intended to tear down the buildings to redevelop the Property. Hall Street refused.

42. Mattel provided a list of repairs to the Landlord before beginning work. Mattel kept Hall Street informed by providing regular status reports and providing Hall Street with the opportunity to inspect the work. Neither Hall Street nor Mortenson, Hall Street's consultant, responded to the letters, and neither visited the Property or criticized the work while it was performed.

43. The City of Beaverton inspected repairs on the roof and other building elements both before and after the work was completed, and approved all work performed. All of the materials used in the work performed were equal or better in quality and class to the original work.

44. Mattel expended more than one million dollars in repairs to the Hall Street facility in 2000. In its final inspections before returning the Property to the Landlord at the end of May 2001, Mattel determined that the structures were in good condition, that none of the roofs leaked, and that all of the mechanical, electrical, water and other equipment, pipes, fixtures, pavement, and systems on the Property were in good working order.

45. Hall Street presented no evidence regarding the condition of the Property when View-Master began its lease.

Third-Party Lawsuits

46. Hall Street and Cascade were sued by former employees of Tyco for their negligence as Landlord for the TCE Contamination. These cases are identified as the *Keith, Phelps*, and *Schiffer* cases. Those cases were subsequently dismissed for lack of proof of any injury caused by any condition at the property.

47. Hall Street incurred expenses defending those claims and seeks indemnification from Mattel as follows: For legal services rendered by Schwabe, Williamson and Wyatt: *Schiffer*—$2,170.83; *Phelps*—$7,934.02; *Keith*—$25,390.25; and for legal services rendered by Short, Cressman and Burgess: $26,617.08.

48. GAF Hall Street, and Mattel were also sued by the daughter of a Tyco worker in the *Christopherson* case for personal injuries allegedly caused by TCE contamination

> including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street;
>
> (2) Expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;
>
> (3) Damages, if any, to Hall Street's use or right to withdraw water from under the property;
>
> (4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property;

(5) Expenses incurred by Hall Street for legal services rendered by Short, Creasman in connection with environmental issues on the property; and

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

(d) Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

2. Hall Street brings each of these claims against Mattel under the theory of breach of contract. That is, Hall Street alleges that Mattel breached the Lease. Under Oregon law, to Maintain an action for breach of contract the plaintiff must establish (1) a valid contract between the parties, (2) a breach or failure without legal excuse to perform any promise that is a part of the contract, and (3) resulting damages to the plaintiff. 17A Am. Jur. 2d Contracts § 716 (1991); Reliable Credit Assoc. Inc. v. Credithrift of America, Inc., 570 P.2d 379, 381 (Or. 1977). For there to be a valid contract, the party bringing the action must be in compliance with the terms of the contract; and not in breach. 17A Am Jury. 2d Contract § 716 (1991). Hall Street, as the plaintiff in this action, has the burden of proof to establish all requisite elements to maintain a breach of contract. Pickard v. Or. Senior Citizens, Inc., 395 P.2d 168, 170 (Or. 1964).

Lease Interpretation

3. Under Oregon law, the construction of a contract is a question of law for the court. *Anderson v. Divito*, 130 Or. App. 272, 277, 908 P.2d 315 (1995) (citing *Timberline Equip. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 281 Or. 639, 643, 576 P.2d 1244 (1978)). The court's goal is to give effect

to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763 (1997) (citing *Investment Serv. Co.v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and O.R.S. 42.240 (in the construction of a written instrument the intention of the parties is to be pursued if possible)).

"To interpret a contractual provision . . . , the court follows three steps. First, the court examines the text of the disputed provision, in the context of the document as a whole." *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997). "If the provision is clear, the analysis ends." *Id.*

> When considering a written contractual provision, the court's first inquiry is what the words of the contract say . . . . To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Id. (quoting *Eagle Indus., Inc. v. Thompson*, 321 Or. 398, 405, 900 P.2d 475 (1995).

A contract or term is unambiguous if it has only one sensible and reasonable interpretation. *D & D Co. v. Kaufman*, 139 Or. App. 459, 462, 912 P.2d 411 (1996). For a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. *Moon v. Moon*, 140 Or. App. 402, 407, 914 P.2d 1133, *rev. den.*, 323 Or. 484, 918 P.2d 848 (1996).

If the contractual provision at issue is still ambiguous after examining the text and its context, the second step "is to examine extrinsic evidence of the contracting parties' intent." *Yogman*, 325 Or. at 363. In determining whether an ambiguity exists, the court may consider parol and other extrinsic evidence. *Moon*, 140 Or. App. at 407; *see also Adams v. Knoth*, 102 Or. App. 238, 243-44, 794 P.2d 796 (1990) ("in deciding if the language of a contract is ambiguous, it is proper for the court to consider extrinsic evidence regarding the circumstances under which the agreement was made or to which it relates."). The parties' "practical construction of an agreement may hint at their intention." *Yogman*, 325 Or. at 364.

If the first two analytical steps have not resolved the ambiguity, the court proceeds to the third and final analytical step: the use of "appropriate maxims of construction." *Id.* Presumably, if the language is still ambiguous, then what the parties intended by that language is to be decided by the trier of fact. *See Oregon Sch. Employees Assn v. Rainier Sch. Dist No. 13*, 311 Or. 188, 194, 808 P.2d 83 (1991) ("If contract terms are ambiguous, then the trier of fact is to ascertain the intent of the parties and construe the contract consistently with their intent.").

4. Considering the text of the Lease as recited in Paragraphs 21 and 22 of the Amended Findings of Fact in the context of the document as a whole, I conclude as follows:

a. "Predecessors-in-Interest":

(1) The term "predecessors-in-interest" in Section 13.a. is subject to more than one logical interpretation and is, therefore, ambiguous. It can plausibly be construed to include Sawyers and GAF, or be construed, as commonly understood, to exclude Sawyers and GAF. See Amended Finding No. 2.

(2) Turning to the extrinsic evidence of the parties' intent (See Amending Finding Nos. 23 and 24.), Cascade's rejection of the proposed language changes shows their intent to include GAF and Sawyers. The contemporaneous writings of the parties and the testimony and narrative statements of Mr. Kennedy and Mr. Wesolowski show View-Master's intent to exclude GAF and Sawyers. I conclude that the parties did not have a meeting of the minds concerning the meaning of the term "predecessors-in-interest," View-Master merely feared that the language might be interpreted to include GAF and Sawyers.

(3) In ascertaining the intent of the parties, the following factors appear relevant:

(a) GAF and Sawyers were prior owners of the Property, who also operated the toy manufacturing business. They had no privity with View-Master. View-Master International Group, Inc. had previously owned the Property and operated the business, and was a "predecessor-in-interest" to View-Master Ideal Group, the Tenant at the time of the lease negotiations;

(b) The exception in Section 13.a., limiting View-Master's liability to the extent it is in compliance with applicable environmental laws, would not be necessary if "predecessors-in-interest" does not refer to GAF and Sawyers since View-Master could not otherwise be liable for conditions existing prior to 1981;

(c) "Predecessors-in-interest" is written in the plural, not the singular; and

(d) The Lease, as a whole, is clearly written to impose broad liability on View-Master for environmental cleanup costs:

Therefore; weighing the foregoing factors, I conclude that the term "predecessors-in-interest in Section 13.a. must refer to GAF and Sawyers.

b. Repairs/Maintenance Sections 8.a. and 20 must be read together. Mattel assumed all repair and maintenance obligations, with all such repairs to be in quality and class equal to the original work or installations. This obligation is in no way diminished by the terms of Section 20. However, nothing in the Lease requires Mattel to build new buildings, to bring existing buildings up to current code requirements, or to retrofit the buildings to comply with the accessibility requirements of the American with Disabilities Act ("ADA").

c. Indemnification: The term "predecessors-in-interest," as used in Section 13.a., includes Sawyers and GAF. See above. Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease. The only exception arises when Mattel, Tyco, and View-Master (i.e., not including Sawyers and GAF) have been in compliance with applicable environmental laws and have not directly or indirectly contributed to the presence or use of the particular hazardous waste. This exception applies to both the cleanup of hazardous wastes and to any other liability, damages, or expenses.

d. Environmental: In addition to the indemnification clause, Section 13.a., Mattel agreed in Section 12.b. to assume all liability for the use or presence of hazardous wastes irrespective of when the use occurred. This liability is not limited to "predecessors-in-interest." However, the same exception applies.

e. Causation: Causation only applies if the exceptions in Sections 12.c. and 13.a. apply. Otherwise, there is no requirement in the Lease that there be actual causation

of loss. The "to the extent" language of the exceptions in Sections 12.c. and 13.a. does not add a causation element. As Judge Jones stated: "The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation it can avoid only if it complies with all applicable environmental laws."

f. Quiet Enjoyment: There is no evidence that Hall Street breached Mattel's right to the peaceful and quiet enjoyment of the Property pursuant to Section 33.h. Mattel was in a better position than Hall Street to know the condition of the property and it would be inconsistent with the broad indemnity requirements of the Lease to say that the presence of hazardous wastes was a breach of quiet enjoyment.

Environmental Issues

5. "Applicable environmental laws": Judge Jones determined that "Mattel's failure to test the water for contaminants was in fact a violation of 'applicable environmental laws' within the meaning of the lease." Specifically, Mattel violated Oregon's Drinking Water Quality Act by failing to test the well water for contaminants. Therefore, the exceptions in Sections 12.c. and 13.a. do not apply.

6. TCE: Mattel is liable for the TCE contamination to the shallow soil and shallow groundwater on the Property pursuant to Section 12.b. However, no current or future remediation or special conditions are necessary, except in the GAF/Sawyers drainfield area, which includes Buildings 800/900 and 1100/1150. Because the DEQ conducted a risk assessment, no further site characterization and investigation is necessary. Because the risk in the drainfield area is limited to trench workers who may be exposed to shallow groundwater, damages would only be incurred if future excavations will occur. Hall Street offered no future development plans,

yet calculated damages based upon below grade construction requiring a dewatering system over a 30-year period. Some future development is likely, but not below grade construction. Dewatering is necessary only to protect trench workers. Therefore, damages are limited to $9,000.00.

7. TPH: Mattel is liable for the TPH contamination under Buildings 400 and 800/900. Although this contamination poses no immediate risk and remediation is only required if the buildings are removed, it must eventually be cleaned up. Mattel is only responsible for remediation costs and not for any demolition or restoration costs since the cleanup is not required until the buildings are removed. The cost of excavating, hauling, and disposing of this soil and concrete is not "in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street," i.e., $130,000.00.

8. Water Rights: The permanent shutdown of the well due to TCE contamination of the deep aquifer has resulted in the loss of the use of the well. Mattel is liable for this loss. Hall Street's argument that the proper measure of damages is the cost of acquiring substitute water is rejected because Hall Street can pass on the costs of water to its tenants. The proper measure of damages is one of the following: (a) the diminution in value of the Property due to the loss of water rights; (b) the diminution in lease value due to tenants having to acquire water; or (c) the value of those water rights if Hall Street could sell them. Since Hall Street's water rights were non-transferable and no evidence was presented regarding diminution in value, Hall Street has failed to meet its burden to establish these damages to a reasonable certainty. However, because Hall Street has suffered some damages, nominal damages of $10,000.00 are awarded.

9. Expenses: Mattel is liable for the expenses incurred and which will be incurred in the future by Hall Street in relation to the DEQ proceeding relating to the deep aquifer

contamination by TCE, for environmental consulting services performed by Dames & Moore in the sum of $143,630.52, and for legal services rendered by Short, Cressman and Burgess in connection with environmental issues on the Property in the sum of $216,036.59. These expenses primarily relate to TCE contamination for which Mattel is responsible.

Repair Issues

10. Mattel met its repair and maintenance obligations under Sections 8a and 20 prior to vacating the Property on May 31, 2001.

11. The Lease did not require Mattel to upgrade the facility beyond what was required during its leasehold interest, since such upgrades would clearly be in "quality and class" greater than the original works. Oregon statutes explicitly do not require buildings to upgrade to newer requirements so long as the same occupancy is being continued. Uniform Building Code § 1101.5, 3401; Oregon Electrical Specialty Code, Chapter 27.01.040; see also Prudential Insurance, 68 F.3d at 372-74.

12. Therefore, since none of the required repairs involved substantial alterations to the buildings on the Property, Mattel was not required to bring the buildings up to current code standards or to bring the buildings into compliance with the accessibility requirements of the American with Disabilities Act.

13. The only evidence is that the leak in the roof over Building 800 developed after May 31, 2001.

Indemnity from Third-Party Lawsuits

14. Hall Street is entitled to indemnification from Mattel for the third-party lawsuits in the total sum of $75,304.49 since these claims all related to TCE contamination.

15. Mattel's liability is not limited by the allocation provisions of Section 13.a. There are no other "tenants" to allocate defense costs to. GAF and Sawyers are former owners.

16. The "exclusive remedy" defense is not available to Mattel. Mattel was not an employer and Mattel is contractually liable for these costs pursuant to the Lease.

17. Hall Street's failure to test the water prior to 1998 does not result in a reduction in Mattel's liability for these defense costs since Mattel agreed to indemnify Hall Street for these costs.

CONCLUSION

Based on the foregoing, the ultimate issues are answered as follows:

A. The repairs and maintenance that Mattel performed prior to May 31, 2001, satisfied its repair and maintenance obligations under the Lease.

B. Mattel is obligated to pay to Hall Street, in connection with litigation brought by third parties, the sum of $75,304.49.

C. Hall Street has not suffered any compensable losses for TPH contamination in excess of the amount of $130,000.00 previously offered to Hall Street by Mattel, and Mattel is obligated to pay to Hall Street the sum of $130,000.00.

D. Mattel is obligated to pay Hall Street the sum of $9,000.00 for TCE contamination to shallow soils and shallow groundwater.

E. Hall Street has failed to prove the amount of its damages with respect to the loss of the right to withdraw water from under the property, and is awarded nominal damages of $10,000.00.

F. Mattel is obligated to reimburse Hall Street for expenses incurred relating to the DEQ proceeding for environmental consulting services performed by Dames & Moore in the sum of $143,630.52 and for legal services rendered by Short, Cressman and Burgess in the sum of $216,036.59.

G. Mattel shall indemnify Hall Street for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the Property.

IT IS THEREFORE the Order of the Arbitrator, pursuant to the Arbitration Agreement between the parties:

1. Hall Street is awarded judgment against Mattel, Inc. in the sum of $583,971.60.

2. Hall Street is awarded declaratory judgment against Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the Property.

3. Hall Street and Mattel are directed to submit simultaneous briefs concerning the prevailing party issue by September 20, 2002. Oral argument is set for September 27, 2002, at 9:00 a.m. concerning the prevailing party issue.

DATED this 3rd day of September, 2002.

/s/ Larry T. Coady
LARRY T. COADY
Arbitrator

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

OPINION AND ORDER

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JONES, Judge:

When this case was last before me, I reversed the arbitrator's decision and remanded for further proceedings. See Hall Street Associate& L.L.C. v. Mattel Inc., et al., No. CV-00-355, slip op. (D. Or. Apr. 29, 2002) ("April Opinion" or "Hall Street I"). On remand, the arbitrator designated plaintiff Hall Street Associates, LLC ("Hall Street") the prevailing party, awarded Hall Street judgment plus costs and attorneys' fees, and entered a declaratory judgment in Hall Street's favor. Both Hall Street and Mattel, Inc., et al., ("Mattel") filed motions (# 90, # 92) for review and modification of the arbitration award.

As discussed below, Hall Street's motion (#90) is denied, and Mattel's motion (# 92) is granted in part and denied in part. Because my resolution of the motions does not require further action by the arbitrator, the arbitration award is adopted in part and reversed in part, and judgment is entered accordingly.

BACKGROUND

The background of this case is set forth in this court's Opinion and Order issued in April 2002. See Hall Street I, at 2-8. In the April Opinion, I reversed the arbitrator's conclusion that Mattel's failure to test the water for contaminants did not constitute a violation of "applicable environmental laws" under the lease. See Hall Street I, at 16. I also instructed the arbitrator to determine whether the parties intended the term "predecessors-in-interest" to apply to GAF and Sawyers, the prior occupants of the property. See Hall Street I, at 19-20.

In September 2002, after briefing and oral argument, the arbitrator issued Amended Findings of Fact and Conclusions of Law. See Arbitrator's Amended Findings of Fact and Conclusions of Law, Sept. 3, 2002 ("FF/CL 9/3/02"). The arbitrator concluded that the term "predecessors-in-interest"

in Section 13(a) of the lease is ambiguous because it plausibly could be interpreted as either referring to GAF and Sawyers, or not referring to them. See FF/CL 9/3/02 at 18. When an examination of the extrinsic evidence did not resolve the ambiguity, the arbitrator found that the parties must have intended the term to apply to GAF and Sawyers, because the exceptions to liability in Section 13(a) would not otherwise be necessary, because the term is plural, and because the lease is written to impose broad liability on the tenant. See FF/CL 9/3/02 at 19.

The arbitrator awarded Hall Street the following damages: $9,000 for the dewatering necessary to protect trench workers who might be exposed to contaminated groundwater, $130,000 for the cost of excavating, hauling and disposing of contaminated soil and concrete; $10,000 in nominal damages for the loss of Hall Street's water supply; $143,630.52 for consulting services performed by Dames & Moore; $216,036.59 for legal services rendered by Short, Cressman and Burgess ("Short Cressman") related to Department Of Environmental Quality ("DEQ") proceedings; and $75,304.49 for Hall Street's legal costs in defending third-party lawsuits related to trichloroethene ("TCE") contamination. See FF/CL 9/3/02 at 21-23. The arbitrator also required Mattel to indemnify Hall Street for all future costs that Hall Street may be required to pay the DEQ or may incur in complying with a decree or order from the DEQ. See FF/CL 9/3/02 at 24.

In October 2002, the arbitrator issued Findings of Fact and Conclusions of Law designating Hall Street the "prevailing party" under Section 24 of the lease, and directing Hall Street to submit its claim for attorneys' fees and costs. See Arbitrator's Findings of Fact and Conclusions of Law, Oct. 2, 2002, at 3 ("FF/CL 10/2/02"). Later in October 2002, the arbitrator awarded Hall Street $248,684.67 in attorneys' fees, and $85,629.99 in costs and expenses. See Arbitrator's Findings of Fact and Conclusions of Law, Oct. 28, 2002, at

2-3 ("FF/CL 10/28/02"). The arbitrator awarded Hall Street post-judgment interest at the state statutory rate of nine percent from the date the arbitration award was signed until paid. *See* FF/CL 10/28/02 at 4.

In November 2002, the arbitrator issued his Final Arbitration Award for judgment for Hall Street of $484,031.12, attorneys' fees of $252,065.32, and costs of $74,011.05, with interest on the entire amount of nine percent from the date of the arbitration award until paid.[1] See Arbitrator's Final Arbitration Award, Nov. 19, 2002, at 2 ("Final Award"). The Final Award also granted Hall Street declaratory relief for futures costs Hall Street may be required to pay DEQ or may incur due to a DEQ consent decree or order. See Final Award at 2.

STANDARD OF REVIEW

The April Opinion fully discussed the standard of review. *See Hall Street I*, at 8-9. In short, the parties drafted an arbitration agreement setting the standard of review: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *See Hall Street I*, at 8-9.

DISCUSSION

1. Hall Street's motion to modify the arbitration award.

Hall Street argues that the arbitration award contains three errors: (1) the improper measure of damages for Hall Street's contaminated water supply; (2) the omission of late fees and

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[1] In the Final Arbitration Award the arbitrator corrected "certain inadvertent errors" that had occurred in the prior calculations, and entered the correct amount of damages and attorneys' fees and costs. See Arbitrator's Final Arbitration Award, Nov. 19, 2002, at 1-2 ("Final Award"). Neither party objected to the variance between the initial award and Final Award, and I adopt the amounts stated in the Final Award.

prejudgment interest and an incorrect post-judgment interest rate; and (3) an overly-narrow award of declaratory relief that does not encompass potential third-party lawsuits.

A. The measure of damages for Hall Street's lost water supply.

Hall Street argues that the arbitrator erred in concluding that Hall Street had not established damages for the TCE contamination of the deep aquifer. Under the "cost of replacement" measure of damages, Hall Street argues that it proved the present value of its water supply to be $8.2 million and should have been awarded that amount.

The arbitrator stated that "[t]he permanent shutdown of the well due to TCE contamination of the deep aquifer has resulted in the loss of the use of the welL Mattel is liable for this loss." FF/CL 9/3/02 at 21. The arbitrator rejected Hall Street's argument that the proper measure of damages is the cost of acquiring substitute water, concluding that Hall Street could pass on the costs of the water to its tenants. See FF/CL 9/3/02 at 21-22. The arbitrator stated that damages should be measured as either the diminution of the property value, the diminution of the lease value, or the value of water rights if Hall Street could sell them. See FF/CL 9/3/02 at 22. Because the water rights are non-transferable, and because Hall Street presented no evidence regarding the diminution in value of either the property or the lease value, the arbitrator found that Hall Street had not met its burden of establishing damages to a reasonable certainty. See FF/CL 9/3/02 at 22.

My analysis is two-fold: first I must determine the measure of damages, then I must review for error the arbitrator's conclusion that Hall Street did not present substantial evidence. The Oregon Supreme Court has stated that "[a] permanent injury to land justifies an award of damages measured by the resulting diminution in the value of the property." Hudson v. Peavey Oil Co., 279 Or. 3, 10, 566 P.2d

175 (1977); accord Millers Mut. Fire Ins. Co. v. Wildish Constr. Co., 306 Or. 102, 117, 758 P.2d 836 (1988) (en banc) ("[T]his court has generally held that when the injury to real property was permanent, the damages were measured by the difference in value immediately before and immediately after the injury or the diminution-in-value rule."). Conversely, "[t]emporary injury, or injury which is reasonably susceptible of repair, justifies damages measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both, depending on the circumstances." Hudson, 279 Or. at 10; Millers, 306 Or. at 117. To constitute a permanent injury to real property, the injury "need not be permanent in the sense that it will last forever in order to justify the use of the diminution of value measure of damages," but it must be likely to persist for a reasonable period of time such that the property's value is significantly affected. See Hudson, 279 Or. at 10-11.

The "cost of replacement" measure of damages is used where there is injury to a structure or an improvement to the land. In Oregon Mut. Ins. Co. v. Mathis, 215 Or. 218, 334 P.2d 186 (1959), the Oregon Supreme Court cited McCormick on Damages for the rule that "if the improvement is destroyed, and may readily be treated as a unit in itself, apart from the land, as in the case of a house or other building, the value of the improvement itself at the time of its destruction is usually taken as the basis of compensation, and, in ascertaining this value, the original cost or the cost of replacement, with allowance for depreciation, may be considered." 215 Or. at 220. In Millers, the Oregon Supreme Court applied the rule from Mathis to conclude that, because the plaintiffs "have treated their house 'as a unit in itself, apart from the land[,]' [w]e hold that the value of a house at the time of its destruction is the proper measure of damages." See Millers, 306 Or. at 125. The court in Millers stated that its result was "exactly the same" as the "only other case we have in which the building was totally destroyed." 306 Or. at 126.

Hall Street analogizes to Millers by arguing that the water supply is capable of valuation separate and apart from the real property, and argues that damages should be measured by the reasonable cost of replacing the water supply. I disagree, and conclude that the "cost of replacement" measure of damages is inapplicable because Hall Street never treated the water supply as a "unit in itself, apart from the land," and because the discarded TCE injured the property, not a structure or improvement made to the property. The TCE contamination of the water supply constitutes a permanent injury to the property, triggering the "diminution in value" measure of damages. Thus, to recover for the contaminated water supply, Hall Street needed to present evidence of the difference between the value of the property with the water supply and the value of the property without the water supply. The arbitrator found that Hall Street had not presented substantial evidence of the diminution in value of the property. I find no error in the arbitrator's application of the "diminution in value" measure of damages or the finding that Hall Street did not present substantial evidence of its damages.

B. Prejudgment interest and late fees, and modification of the post-judgment interest rate.

Hall Street makes three arguments regarding the pre and post-judgment interest rates. First, Hall Street argues that the arbitrator erred by not awarding prejudgment interest and a late fee on the award of damages. Hall Street cites Sections 4 and 16(b) of the lease as requiring a prejudgment interest rate of eighteen percent and a five percent late fee on any sum payable. Second, Hall Street argues that the arbitrator should have awarded prejudgment interest on the attorneys' fees and costs in accordance with Section 24. Third, Hall Street argues that Sections 4 and 16(b) set the post-judgment interest rate at eighteen percent. Mattel contends that interest should begin to accrue on the date judgment is entered, and that the federal

post-judgment interest rate applies in this case, rather than the state statutory rate.

Under ORS 82.010(1)(c), interest is payable on "[a]ll moneys after they become due . . . ." The Oregon Supreme Court has held that "interest on unliquidated damages for breach of contract is proper, where (1) the exact amount of damages is either ascertained or readily ascertainable, and (2) the time from which the interest runs is easily ascertained." Krieg v. Union Pac. Land Resources Corp., 269 Or. 221, 234, 525 P.2d 48 (1974) (citing Public Market Co. v. Portland, 171 Or. 522, 130 P.2d 624 (1943)); accord Miller v. Meisel Co., Inc., 183 Or. App. 148, 181, 51 P.3d 650 (2002). In determining whether damages are ascertainable, "[t]he facts that defendant disputed any liability and that the jury did not award plaintiff all the damages that it sought are insufficient grounds to deny prejudgment interest." Banister Cont'l Corp. v. Northwest Pipeline, Corp., 76 Or. App. 282, 293, 709 P.2d 1103 (1985), vacated on other grounds 301 Or. 763, 724 P.2d 822 (1986); accord Strader v. Grange Mut. Ins. Co., 179 Or. App. 329, 339, 39 P.2d 903 (2002) ("Since Banister, we have repeatedly reaffirmed its holding, despite the fact that the Supreme Court vacated our opinion on unrelated grounds."). The Oregon courts have stated it is "well settled" that prejudgment interest is proper even where damages are not ascertainable until issues of fact are decided. See Strader, 179 Or. App. at 339; Miller, 183 Or. App. at 182. To find the date when interest begins to accrue, Oregon courts examine the record for evidence of when the damage occurred. See Miller, 183 Or. App. at 181 (finding that the record established "one possible date" when damages occurred); Klokke Corp. v. Classic Exposition, Inc., 139 Or. App. 399, 410-11, 912 P.2d 929 (1996) (finding that nothing in the record showed when each portion of damages accrued; concluding that no basis for determining when damages became ascertainable).

Here, the arbitrator concluded that "Hall Street is not entitled to prejudgment interest on its award. Damages were not readily ascertainable and liability was not clear." FF/CL 10/28/02 at 3. The arbitrator awarded Hall Street "interest on the entire amount at the rate of 9% from the date of this Arbitration Award until paid," and set the due-date for damages as thirty days after this court enters judgment. Final Award at 2. I construe the arbitrator's decision that interest begins to accrue from the date of the arbitration award, prior to the date this court enters judgment, to be a limited award of prejudgment interest, and review it as such.

Under Oregon law, once the arbitrator's findings of fact and conclusions of law made damages ascertainable, prejudgment interest should have been awarded. See Strader, 179 Or. App. at 339. The first readily ascertainable date from which interest should begin to accrue is the date of the arbitration award, because the damages occurred over a substantial, indefinite period of time and the award includes amounts for future remediation. See Klokke, 139 Or. App. at 410-11; cf. Miller, 183 Or. App. at 181 ("[a]s to the date on which interest would begin to accrue, the record contains only one possible date"); Strader, 179 Or. App. at 338 ("Defendant does not argue that the trial court chose the wrong date or that the date is not ascertainable."). The arbitrator's award of prejudgment interest from the date of the arbitration award is, therefore, consistent with Oregon law.

Hall Street also requests prejudgment interest on the attorneys' fees and costs under the last clause of Section 24, which states "attorneys' fees, costs and expenses shall be deemed to have accrued on the commencement of such action." See Mattel's Arbitration Ex. 102 at 23 ("1991 Lease") (emphasis added). Hall Street cites Sections 4 and 16(b) of the lease as the bases for awarding prejudgment interest. The arbitrator awarded Hall Street its reasonable attorneys' fees, costs and expenses pursuant to Section 24 of

the Lease, but declined to award prejudgment interest on attorneys' fees and costs, finding that the last clause of Section 24 was "clearly intended to allow for attorneys' fees, costs and expenses incurred prior to the commencement of the litigation and is not a basis for interest and late fees on such fees and costs from the date of commencement of litigation." FF/CL 10/28/02 at 2.

I tend to agree with Hall Street that the last clause of Section 24 appears to provide for the computation of interest on attorneys' fees from the outset of litigation, however, Hall Street's reliance on Sections 4 and 16(b) is misplaced. I find Sections 4 and 16(b) to be inapplicable penalty provisions, see below, and do not interpret Section 24, standing alone, as providing for prejudgment interest.[2] Because I find that Hall Street is only entitled to post-judgment interest on attorneys' fees and costs, I reverse the arbitrator's award of interest on attorneys' fees and costs between the date of the arbitration award and the date judgment is entered.

Hall Street argues that Sections 4 and 16(b) require an eighteen percent interest rate and a five percent late fee on both pre and post-judgment interest. Section 4 states that the five percent late fee applies to amounts "not paid by the fifteenth (15th) day of the month" and the eighteen percent interest rate applies to "delinquent Rent or other sums payable . . . calculated from the original due date." 1991 Lease at 4. Likewise, Section 16(b) states that "delinquent Rent or other amounts due under the Lease shall bear interest at the rate of 18% per annum from the date due until paid . . . ." 1991 Lease at 18. I interpret Sections 4 and 16(b) as

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[2] I note that Oregon statutes and cases do not appear to provide for prejudgment interest on attorneys' fees and costs, had Hall Street relied on them. See ORS 82.010(2)(d) ("Interest . . . shall also accrue on attorney fees and costs entered as part of the judgment"); Miller v. Meisel, 183 Or. App. 148, 181, 51 P.3d 650 (2002) (stating that prejudgment interest on unliquidated damages for breach of contract is proper).

penalty provisions that apply to amounts overdue under the lease. No provision of the lease imposes a due-date for amounts awarded under the indemnity provision, and the arbitration award expressly set the due-date for Mattel to pay the arbitration award as thirty days from the date this court enters judgment. Therefore, I conclude that the penalty provisions in Sections 4 and 16(b) are only applicable to delinquent amounts due under the lease, and have no application to the pre or post-judgment interest rate.[3]

Mattel argues that the arbitrator incorrectly applied the nine percent state statutory interest rate instead of the six percent federal statutory interest rate. At oral argument, the parties agreed that if the contractual interest rate was not applicable, the federal statutory post-judgment interest rate of six percent would apply. I agree with the parties and modify the post-judgment interest rate accordingly. See 28 U.S.C. § 1961(a). However, the state statutory interest rate applies to the arbitrator's award of prejudgment interest front the date of the arbitration award until judgment is entered. See In re Niles, 106 F.3d 1456, 1463 (9th Cir. 1997) (stating that because debt "arose under state law, the award of prejudgment interest is also governed by state law" (internal citation omitted)).

In sum, Hall Street is awarded prejudgment interest on its damages with interest to accrue from the date of the arbitration award, and post-judgment interest on its damages and attorneys' fees and costs with interest to accrue from the date this court enters judgment. The state statutory interest rate of nine percent applies to the award of prejudgment interest, and the federal statutory rate of six percent applies to the award of post-judgment interest.

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[3] I leave open the question of whether the penalty provisions will apply if Mattel does not pay the arbitration award within thirty days from the date this court enters judgment.

C. Expanding the declaratory relief.

Hall Street argues that the arbitrator's award of declaratory judgment against Mattel should be expanded to cover all costs that Hall Street may incur as a result of the TCE contamination on the property. Hall Street requests that the declaratory judgment be amended as follows:

> "Mattel must assume liability for all future losses, costs, damages, expenses or liabilities incurred by Hall Street directly or indirectly resulting from the TCE contamination, including without limitation any amounts Hall Street may be required to pay to DEQ or expend as a result of a DEQ consent authorities (including, without limitation, the U.S. Environmental Protection Agency and the City of Beaverton), adjacent landowners or other third parties who may assert claims against Hall Street regarding TCE contamination."

Hall Street Mem. in Supp. at 14-15. The arbitrator awarded Hall Street declaratory judgment against Mattel for "all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the property." FF/CL 9/3/02 at 24. Both my April Opinion and the arbitration award found that the lease imposed broad liability on the tenant for any environmental damage to the property. The arbitration award also required Mattel to indemnify Hall Street for the costs of third-party lawsuits related to TCE contamination, which I have upheld.

While I see no reason why Mattel would not be liable for future third-party lawsuits related to TCE contamination, I decline to expand the declaratory relief to include potential third-party lawsuits because Hall Street has not demonstrated that the arbitrator's award of declaratory relief was erroneously narrow.

2. Mattel's motion to modify the arbitration award.

Mattel contests three aspects of the arbitration award: (1) the interpretation of the term "predecessors-in-interest"; (2) the conclusion that the exceptions to liability in Sections 12 and 13(a) are inapplicable; and (3) the calculation of damages.

A. The term "predecessors-in-interest".

In the April Opinion, I reversed the arbitrator's conclusion that, although the term "predecessors-in-interest" in Section 13 included GAF and Sawyers, the exceptions to liability applied because Mattel had complied with "applicable environmental laws." When I remanded the case, I instructed the arbitrator to develop the record as to the meaning of the term "predecessors-in-interest":

> "[I]t appears that the arbitrator did not review substantial evidence relevant to the parties' intent in construing the term predecessors-in-interest. [] Accordingly, on remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term 'predecessor-in-interest' in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record."

Hall Street I, at 19-20. On remand, the arbitrator found the term to be ambiguous and found that extrinsic evidence did not resolve the ambiguity. The arbitrator weighed several factors in concluding that "the term 'predecessors-in-interest' in Section 13.a. must refer to GAF and Sawyers." FF/CL 9/3/02 at 19.

Mattel objects to the arbitrator's conclusion that GAF and Sawyers are predecessors-in-interest under the lease. Mattel argues that Hall Street presented no testimony regarding the meaning of the term, and that no party understood the term to include GAF and Sawyers. Mattel also argues that, as a

matter of law, the arbitrator's conclusion that the term is ambiguous renders the contract invalid. In response, Hall Street cites a letter from View-Master's counsel to Cascade's counsel as demonstrating that View-Master fully understood the obligations it assumed by signing the lease.

In Oregon, the construction of a contract is a question of law for the court, Anderson v. Divito, 138 Or. App. 272, 277, 908 P.2d 315 (1995), with the goal being to give effect to the parties' intentions. Anderson v. Jensen Racing, Inc., 324 Or. 570, 575-76, 931 P.2d 763 (1997). In Yogman v. Parrott, 325 Or. 358, 937 P.2d 1019 (1997) (en banc), the Oregon Supreme Court laid out three steps for courts to follow when interpreting a contract provision. 325 Or. at 361. "First, the court examines the text of the disputed provision, in the context of the document as a whole." Yogman, 325 Or. at 361. In the absence of any ambiguity, the court construes the words of a contract as a matter of law and the analysis ends. Yogman, 325 Or. at 361. A contract term is unambiguous if it has only one sensible and reasonable interpretation. See D&D Co. v. Kaufman, 139 Or. App. 459, 462, 912 P.2d 411 (1996).

If ambiguity exists, the second step is for the court "to examine extrinsic evidence of the contracting parties' intent." Yogman, 325 Or. at 363, see also Webb v. National Union Fire Ins. Co., 207 F.3d 579, 582 (9th Cir. 2000) ("[T]he consensus among Oregon courts is that they are opposed to considering extrinsic evidence to determine the parties' intent unless an ambiguity is apparent from the four corners of the document"). Under ORS 42.220, the circumstances surrounding contract formation are to be considered by the court.[4] If

[4] ORS 42.270 provides in full:

> In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting.

the ambiguity is not resolved by extrinsic evidence of the parties' intent, the court proceeds to the third step: "rel[ying] on appropriate maxims of construction." See Yogman, 325 Or. at 364; Portland Fire Fighters' Ass'n v. City of Portland, 181 Or. App. 85, 91, 45 P.3d 162 (2002).

Here, the term "predecessors-in-interest" appears in Section 13(a):

> "Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its . . . predecessors-in-interest . . . occurring during or prior to the Original Lease, during this Lease, relating to discharging hazardous materials, or arising from any breach or default under the Lease by Tenant."

1991 Lease at 12-13. Section 13(a) of the lease provides that the tenant will indemnify the landlord for the acts of the tenant as well as the tenant's predecessors-in-interest. The lease states that View-Master Ideal Group, which was formerly known as View-Master International Group,[5] is referred to throughout the lease as "View-Master" or "Tenant."[6] If the terms 'View-Master" and "Tenant" were

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[5] As set out in the April Opinion, the parties to the 1991 lease at issue were View-Master Ideal Group, Inc. ("View-Master Ideal") and Cascade Square Associates ("Cascade"). View-Master Ideal was known as View-Master International prior to 1987. View-Master Ideal was acquired by Tyco in 1989, and Tyco was acquired by Mattel in 1997. Cascade became Hall Street after 1991.

[6] The introductory caption of the lease states, in relevant part:

> THIS LEASE . . . [is] between CASCADE SQUARE ASSOCIATES, a Washington partnership ("Landlord") and VIEW-MASTER IDEAL GROUP, INC, an Oregon Corporation, f/k/a [formerly known as] View-Master International Group, Inc. ("View-Master" or "Tenant"), a wholly-owned subsidiary of Tyco Toys, Inc.

1991 Lease at 1 (first alternation added).

interchangeable, as the contract states they were when it was formed, Section 13(a) requires View-Master to indemnify the landlord for View-Master's actions (meaning both View-Master International Group and View-Master Ideal Group) as well as the actions of View-Master's "predecessors-in-interest," whether or not those actions occurred during or prior to the original lease in 1985. Because View-Master could not be both the tenant and the tenant's "predecessors-in-interest," the term "predecessors-in-interest" can plausibly be read as referring to GAF and Sawyers, the parties that occupied the property before View-Master.

For the term "predecessors-in-interest" to be ambiguous, the term must be susceptible to another plausible interpretation. See D&D Co., 139 Or. App. at 462. The arbitrator found that the term "predecessors-in-interest" is ambiguous because View-Master International Group had previously owned the property and operated the business, and was a 'predecessor-in-interest' to View-Master Ideal Group. See FF/CL 9/3/02 at 2, 19. Although less plausible than the alternative interpretation, View-Master International Group could be considered a separate entity on the basis that it owned the property before Cascade and before the original lease. Moreover, the term in the indemnity provision does not refer only to the tenant's predecessors, but to the tenant's predecessors-in-interest. Thus, I agree with the arbitrator that the term is susceptible to more than one plausible interpretation, and is, therefore, ambiguous.

The next step is to examine extrinsic evidence of the parties' intent. See Yogman, 325 Or. at 363. Consistent with my instructions on remand, the arbitrator fully developed the record by examining extrinsic evidence of the parties' intent. The arbitrator considered a letter sent from View-Master's counsel to Cascade's counsel, an internal memorandum from View-Master's counsel to his client, and the narrative statements of two attorneys for View-Master. The arbitrator

found that the evidence did not resolve the ambiguity because "Cascade's rejection of the proposed language changes shows their intent to include GAF and Sawyers," while "[t]he contemporaneous writings of the parties and the testimony and narrative statements of Mr. Kennedy and Mr. Wesolowski show View-Master's intent to exclude GAF and Sawyers." FF/CL 9/3/02 at 18-19. I agree with the arbitrator that Cascade's rejection of the proposed language demonstrates its intent that the term include GAF and Sawyers. But unlike the arbitrator, I conclude that the extrinsic evidence establishes that View-Master understood the expansive indemnity obligations imposed by the term, and agreed to assume those obligations by signing the contract with the disputed term present.

One month before the contract was signed, the attorney for View-Master, Michael Kennedy, sent a letter to the attorney for Cascade, Robert Hibbs, stating:

> "First, the present language (of your draft) of Paragraph 13(a) obligates Tenant (View-Master) and therefore Guarantor (Tyco) to indemnify the Landlord from acts of third-party 'predecessors-in-interest' including acts occurring 'prior to the Original Lease'.
>
> We are very concerned at being asked to assume this responsibility. While we have no difficulty at all in agreeing to indemnify Landlord from all acts of View-Master occurring during the original lease, and thereafter, it is the prospect of indemnifying Landlord from acts of GAF, Sawyer's or others which is unfair. This is a broad burden which is not mitigated by other language provisions of the lease[.]
>
> Under the current lease language, View-Master had no such broad responsibility; it seems as if Landlord is securing both a better credit (Tyco) as well as much broader protection than in the prior lease.

> Accordingly, we are again seeking the deletion of the words 'predecessor-in-interest' at lines 6 and 10 of Paragraph 13(a), and also deletion of the words 'or prior to' at line 12 of the same paragraph."

Mattel Arb. Ex. 162 at 1-2 (emphasis added). Kennedy's letter unequivocally demonstrates that, at that time View-Master interpreted the language of Section 13(a) as imposing indemnity obligations for the acts of third-party predecessors-in-interest. The letter also identifies GAF and Sawyers as the third-party predecessors-in-interest that View-Master preferred not to indemnify. To eliminate View-Master's liability for GAF and Sawyers, Kennedy's letter requested that the words "predecessors-in-interest" and "or prior to" be deleted from the lease. According to an internal memorandum written by Kennedy the day after he wrote the letter, the terms were not deleted but new language was added to limit View-Master's liability:

> "While not adopting our proposed language changes, he suggested new language effectively limiting our liability to damages actually caused by the conduct of VMIG.
>
> The result is that no damages for PCB's asbestos, hazardous waste or 'other damage' caused exclusively by predecessors-in-interest would be our responsibility."

Mattel Arb. Ex. 163 (no emphasis added). Because at the time of Kennedy's letter both parties understood that Section 13(a) obligated View-Master to indemnify the landlord for the acts of GAF and Sawyers, the "new language effectively limiting [] liability" must be examined to determine if the parties' understanding of Section 13(a) changed.

Kennedy's narrative statement explains that he "negotiated, and Plaintiff agreed, to add and expand upon two provisions that would not make Tyco responsible for guaranteeing the actions of GAF or its (GAF's) predecessors." Mattel App. at 50 (narrative statement). The first addition was that the

landlord must seek fair and reasonable allocation of defense costs based on tenant's actual contribution to the damages which are the subject of the suit. Mattel App. at 50. The addition of a requirement that the landlord seek contribution in no way clouds the parties' previous understanding that the term "predecessors-in-interest" applied to GAF and Sawyers, and, in fact, presumes liability by requiring the landlord to involve other parties. Kennedy's narrative statement explains the second addition as being that "Tenant would not be held liable following expiration of the Lease for PCB, asbestos, hazardous waste, and other liability that was not caused directly or indirectly by Tenant or its corporate predecessor-in-interest, View-Master Industrial [sic] Group, Inc," Mattel App. at 50. The added language expands the exceptions to liability that appear in 13(a)(i)-(iv), but does not alter View-Master's indemnity obligation as it stood at the time of Kennedy's letter if the exceptions did not apply.

In conclusion, while I am certain that View-Master was "exceedingly reluctant" about indemnifying Cascade for the actions of GAF and Sawyers, and that View-Master believed it was adequately protected from liability by the exceptions and the contribution provision, I find that, as a matter of law, the extrinsic evidence establishes that both Cascade and View-Master understood and intended the term "predecessors-in-interest" to apply to GAF and Sawyer.[7]

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[7] Mattel argues that it defies common sense that a tenant as experienced as View-Master and Tyco would agree to such broad indemnity provisions. On that subject, I find the difference between Michael Kennedy's narrative statement and Dennis Wesolowski's narrative statement to be noteworthy because both attorneys were involved in the lease negotiations on behalf of View-Master. Wesolowski's narrative statement states that Tyco "would not sign a lease with such an inequitable condition since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco." Mattel's App. at 53 (emphasis added). In contrast, Kennedy's narrative statement states that "Tyco was exceedingly reluctant to guarantee a lease with such an inequitable condition

B. Application of the indemnity exceptions in Sections 12 and 13.

Mattel argues that the arbitrator erred in not applying the exceptions to indemnity in Sections 12 and 13. Mattel also argues that the language "to the extent" preceding the phrase "applicable environmental laws" has the operative effect of requiring some cause-and-effect relationship. Hall Street responds that the April Opinion forecloses both of Mattel's arguments, and I agree.

The April Opinion concluded that "[t]he two exceptions to this liability, found in sections 12(c) and 13 of the lease, freed the tenant from liability only if it was in compliance with all 'applicable environmental laws.'" Hall Street I, at 16 (no emphasis added). Because Mattel's failure to test the water for contaminants violated the Oregon Drinking Water Quality Act, "the arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute a violation of applicable environmental laws." Hall Street I, at 18. The April Opinion also rejected Mattel's present argument that a causation requirement exists within the exceptions to liability, stating "there is no requirement in the lease that there be actual causation of loss. The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation that it can avoid only if it complies with all applicable environmental laws." Hall Street I, at 18.

The arbitrator considered Mattel's arguments regarding the exceptions to liability and the causation requirement in light of the April Opinion:

> "[T]here is no requirement in the Lease that there be actual causation of loss. The 'to the extent' language of

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since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco." Mattel's App. at 49 (emphasis added).

> the exceptions in Sections 12.c. and 13.a. does not add a causation element.
>
> * * *
>
> "'Applicable environmental laws': Judge Jones determined that 'Mattel's failure to test the water for contaminants was in fact a violation of "applicable environmental laws" within the meaning of the lease.' Specifically, Mattel violated Oregon's Drinking Water Quality Act by failing to test the well water for contaminants. Therefore, the exceptions in Sections 12.c. and 13.a. do not apply."

FF/CL 9/3/02 at 20, 21. The arbitrator's conclusions are in accordance with my April Opinion, and I find no error.

C. Damages and attorneys' fees and costs.

Mattel contests most of the damages awarded to Hall Street, as well as the post-judgment interest rate. I have carefully considered all of Mattel's objections and conclude that the award of damages and the award of attorneys' fees and costs are supported by substantial evidence and not erroneous.

i. Speculative future losses.

Mattel states that damages must be proven to a reasonable certainty, and that damages under an indemnity provision do not arise until an actual loss is incurred or liability is fixed. Mattel argues that, except for the $128,000 awarded for DEQ costs, Hall Street had not incurred the damages awarded by the arbitrator. Hall Street responds by arguing that Mattel has not cited the damages allegedly based on speculative future losses.

I agree with Mattel that damages must be proven with reasonable certainty, but, like Hall Street, am unclear as to the specific aspects of the arbitration award that Mattel challenges. Insofar as Mattel is challenging the award of

$130,000, the arbitrator found that Mattel is liable for petroleum hydrocarbons ("TPH") contamination and that the "cost of excavating, hauling, and disposing of this soil and concrete is not 'in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street,' i.e., 130,000." FF/CL 9/3/02 at 21. Insofar as Mattel is challenging the award of $9,000 for TCE contamination to shallow soils and shallow groundwater, the arbitrator stated that "Mattel presented evidence that only the sum of $9,000 need be expended to provide dewatering to protect trench workers." FF/CL 9/3/02 at 12, 21. Both awards were based on damage to the property for which Mattel assumed liability under the lease, and both amounts awarded by the arbitrator were proposed by Mattel.

ii. $10.000 in nominal damages for the lost water supply.

Mattel argues that the arbitrator erred in awarding Hall Street $10,000 in nominal damages for the loss of its water supply. In support, Mattel cites an Oregon Supreme Court case stating that "an award of $100 is more than nominal damages." Baden v. Sunset Fuel Co., 225 Or. 116, 118, 357 P.2d 410 (1960). In response, Hall Street cites an Oregon Supreme Court stating that "the term 'nominal' as applied to damages is a relative term and will frequently vary according to the circumstances of each case. What may be substantial damages in one case may be held nominal under other circumstances." Frazee v. Brazda, 239 Or. 624, 627, 399 P.2d 346 (1965).

Although the arbitrator concluded that Mattel is liable for Hall Street's lost water supply, the arbitrator stated that "Hall Street has failed to meet its burden to establish these damages to a reasonable certainty." FF/CL 9/3/02 at 22. Regardless, the arbitrator found that, "because Hall Street has suffered some damages, nominal damages of $10,000 are awarded." FF/CL 9/3/02 at 22. I agree with the arbitrator that Mattel is liable for the contaminated water supply, and I agree that Hall

Street suffered some damages. In the context of this case, I find the award of $10,000 in nominal damages not to be erroneous.

iii. Hall Street as the prevailing party.

Mattel argues that Hall Street was not the prevailing party, much less the lone prevailing party, because Mattel prevailed on the majority of Hall Street's claims. Mattel also argues that, even assuming Hall Street was the prevailing party, the arbitrator should have further reduced the award of attorneys' fees and costs. Hall Street responds that the arbitrator correctly named it the prevailing party under Oregon's statutes and cases, and that the arbitrator's reductions to the award of attorneys' fees were appropriate.

Where a lease does not define the term "prevailing party," the court applies the statutory meaning, which is defined in ORS 20.096(5) as "the party in whose favor final judgment or decree is rendered." Anderson, 324 Or. at 579 (citing Carlson v. Blumenstein, 293 Or. 494, 499-500, 651 P.2d 710 (1982) (footnote omitted)).[8] The Oregon Supreme Court has stated that where parties use the definite article "the" in reference to the prevailing party, "the agreement establishes that every 'suit or action * * * instituted' will result in having one, but only one, prevailing party, who 'shall be entitled to recover' attorney fees 'in addition to costs.'" Anderson, 324 Or. at 578-79. The Oregon Court of Appeals recently capsulized

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[8] The definition of prevailing party found at ORS 20.096(5) was deleted by an amendment which became effective January 1, 2002. However, the definition is still applicable in this case as provided by Section 9, chapter 542:

> [T]he amendments to ORS . . . 20.096 . . . apply only to actions commenced on or after the effective date of this 2001 Act. Any action commenced before the effective date of this 2001 Act shall continue to be governed by the provisions of law in effect immediately before the effective date of this 2001 Act, as though this 2001 Act had never become law.

Anderson as "concluding that, as to claims brought under the contract, there could be only one prevailing party." CMS Sheep Co., Inc. v. Russell, 179 Or. App. 172, 178, 39 P.3d 262 (2002) (no emphasis added). In determining the prevailing party, "[t]he fact that plaintiffs lost more claims than they won is irrelevant to the fact that they 'prevailed' in the legal sense." Anderson, 324 Or. at 581 (Durham, J., concurring). For the defendant to be the prevailing party under ORS 20.096(5), the plaintiff must not succeed on any of its claims. See Wilkes v. Zurlinden, 328 Or. 626, 632, 984 P.2d 261 (1999). If both parties file claims under the contract and are successful, the damages are "netted" to determine the party in whose favor judgment was rendered. *See Carlson*, 293 Or. at 501. If both parties file claims and are unsuccessful, more than one prevailing party may exist under ORS 20.096(5). See Wilkes, 328 Or. at 633. In suits involving both statutory and contract claims, the prevailing party is the party that prevailed on the claims that are subject to the contractual fee provision, not the party that prevails on the action as a whole. See Newell v. Weston, 156 Or. App. 371, 379, 965 P.2d 1039 (1998).

Here, Section 24 of the lease provides that "the losing party shall pay the prevailing party a reasonable sum for attorneys' fees, costs and expenses." The lease does not define the term "prevailing party," so the court applies the statutory definition to determine in whose favor final judgment was rendered. Hall Street sought damages for breach of contract as well as declaratory and injunctive relief under the contract, and was awarded judgment in the sum of $484,031.12 and a declaratory judgment. Mattel filed no counterclaims. As the arbitrator found, there could be only one prevailing party in this case, and Hall Street is the prevailing party because it prevailed on some of its claims brought under the contract.

Regarding the award of attorneys' fees and costs under Section 24, the arbitrator concluded that Hall Street had

properly excluded its attorneys' fees and costs spent litigating the unsuccessful claims, and that the time expended and the hourly rates of the firms employed by Hall Street were reasonable. The arbitrator reduced the award of attorneys' fees for Schwabe, Williamson & Wyatt and Sho[illegible] Cressman by twenty percent and the award of attorneys' fees for Tonkon Torp by twenty-five percent. The arbitrator made the reductions because the fees contained time spent on the repair issue, which should have been excluded, and because Hall Street received nominal damages for the lost water supply and de minimis damages for TCE contamination to shallow soils and groundwater.

I find no basis for upsetting the arbitrator's award of attorneys' fees and costs, and find the accompanying reductions to be reasonable and supported by substantial evidence.

CONCLUSION

Plaintiff's motion (# 90) to modify the arbitration award is DENIED. Defendant's motion (# 92) for review and modification of the arbitration decision is GRANTED in part and DENIED in part. Hall Street is the prevailing party and is awarded judgment in the amount of $484,031.12, plus attorneys' fees of $252,065.32 and costs of $74,011.05. Interest will accrue on the judgment at the rate of nine percent from the date of the arbitration award until this court enters judgment. No interest will accrue on the award of attorneys' fees and costs prior to the entry of judgment. Interest will accrue on the judgment and the award of attorneys' fees and costs at the rate of six percent from the entry of judgment.

IT IS SO ORDERED.

DATED this 1st day of May, 2003.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

JUDGMENT

This matter was bifurcated by the Court's Order dated December 11, 2000.

In the first phase, the Court conducted a bench trial beginning on April 27, 2001 regarding the validity of defendant Mattel, Inc.'s notice of lease termination. The Court rendered its Order in its Findings of Fact and Conclusions of Law on May 21, 2001, ordering that judgment be entered for Mattel on the lease termination issues.

In the second phase, by Stipulation of the parties and Order of the Court dated October 23, 2001 ("Arbitration Order"), Hall Street's remaining claims for indemnification and damages arising out of the lease agreement were sent to arbitration. By stipulation of the parties, the arbitration was held commencing December 12, 2001 before Arbitrator Larry T. Coady. The Arbitrator initially ruled generally in favor of

Mattel. However, the Court granted Hall Street's Motion for an Order Vacating, Modifying and/or Correcting the Arbitration Findings of Fact and Conclusions of Law and, by Opinion and Order dated April 29, 2002, reversed and remanded the case to the Arbitrator for further consideration.

On remand, after further briefing and argument by the parties, the Arbitrator designated Hall Street the prevailing party, awarded Hall Street judgment plus costs and attorneys' fees, and entered a declaratory judgment in Hall Street's favor. Both parties challenged certain aspects of the Arbitrator's Findings of Fact and Conclusions of Law on Remand. By Opinion and Order dated May 1, 2003, the Court generally upheld the Arbitrator's Award on Remand, making only slight modifications to the award of pre- and post-judgment interest. The Court upheld the Arbitrator's conclusions that the lease imposed broad liability on Mattel for any environmental damage to the property and required Mattel to indemnify Hall Street for such costs, including the costs of third-party lawsuits related to TCE contamination. Therefore, in accordance with the Court's May 1, 2003 Opinion and Order,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That plaintiff Hall Street Associates, L.L.C. is declared the prevailing party in this action;

2. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for damages incurred in the amount of $484,031.12;

3. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for attorneys' fees incurred of $252,065.32 and costs incurred of $74,011.05;

4. That interest will accrue on the judgment for damages ($484,031.12) at the rate of nine percent (9%) from the date of the arbitration award (November 19, 2002) until this Court enters judgment;

5. That interest will accrue on both the judgment for damages and the judgment for attorneys' fees and costs (total of $810,107.49) at the rate of six percent (6%) from the entry of judgment until paid;

6. That declaratory judgment be awarded in favor of plaintiff Hall Street Associates, L.L.C. and against defendant Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental clean up of the property; and

7. That plaintiff Hall Street Associates, L.L.C. shall submit a supplemental attorney fee petition for fees and costs incurred since the submission to the Arbitrator of its original fee petition within fourteen (14) days after entry of this Judgment, pursuant to FRCP 54(d)(2)(B).

Dated this 14th day of May, 2003.

/s/ Robert E. Jones
THE HONORABLE ROBERT E. JONES
Senior United States District Judge

Respectfully submitted:

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Michael A. Cohen
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APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed NOV 16, 2004]

No. 03-35525
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff- Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

No. 03-35526
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellant,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellee,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted November 3, 2004
Portland, Oregon

MEMORDNDUM*

Before: TROTT and KLEINFELD, Circuit Judges, and POLLAK,** District Judge.

Our en banc decision in Kyocera Corp. v. Prudential-Bache Trade Services., Inc.[1] controls this case. Under *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.[2] The evidence that the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed is not strong enough to distinguish this case from Kyocera.

Kyocera compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court.[3] On remand the district court shall return to the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

[2] *Kyocera*, 341 F.3d at 1000-02.

[3] *Id.* at 994 ("The Federal Arbitration. Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsub-

application to confirm the original arbitration award (not the subsequent award revised after reversal), and shall confirm that award, unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.[4]

Because we vacate the judgment based on the arbitration agreement we need not reach the attorneys' fees issue.

We affirm the district court's separate finding that Mattel was within its rights in terminating the lease. Although the lease termination provision suggests a possible scrivener's error when the lease was amended, no mistake is claimed nor reformation sought, and the parol evidence rule requires that this integrated agreement be enforced as written without consideration of extrinsic evidence.[5]

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

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stantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts.").

[4] Id. at 997-98.

[5] See Indus. Indem. Co. v. Aetna Cas. & Sur. Co., 465 F.2d 934, 937 (9th Cir. 1972).

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JUN 30, 2005]

Civil No. 00-335-JO

HALL STREET ASSOCIATED, L.L.C.,
A Washigton limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation, et al.,
Defendant.

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JONES, Judge:

This action is before the court on remand from the Ninth Circuit Court of Appeals. Specifically, the appellate court instructs this court to confirm the original arbitration award unless grounds exist under the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, to vacate, modify, or correct the award. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

In February 2005, I invited the parties to submit their objections, if any, to confirmation of the original award. Plaintiff submitted objections and defendant responded. Having considered the parties' arguments and for the reasons stated below, I once again vacate the original arbitration award.

PROCEDURAL HISTORY

Plaintiff Hall Street Associates brought this action against defendants Mattell, Inc., and its predecessor (together, "defendant") for indemnification arising out of a lease agreement. The issues were submitted to an arbitrator in December 2001, who found generally in favor of defendant and awarded fees and costs. On April 29, 2002, I granted plaintiff's motion to vacate the arbitrator's findings and conclusions and remanded the action to the arbitrator for further consideration. On remand, the arbitrator found in favor of plaintiff, awarded costs and fees, and entered a declaratory judgment in plaintiffs favor. Both plaintiff and defendant moved for review and modification of the second arbitration award. On May 1, 2003 I granted plaintiff's motion, granted in part and denied in part defendant's motion, and awarded plaintiff judgment in the sum of $484,031.12, plus attorneys' fees of $252,065.32 and costs of $74,011.05.

Meanwhile, in 2003, the Ninth Circuit decided *Kyocera*, which limited the scope of judicial review of arbitral awards to those grounds allowed under the Federal Arbitration Act

("FAA"). Based on that new interpretation, on January 18, 2005, the Ninth Circuit vacated my April 29, 2002, decision, which vacated and remanded the original arbitration award.

FACTUAL BACKGROUND

This case originally involved several disputes between a landlord and tenant over the tenant's obligations under a lease agreement. Plaintiff owns the property at issue, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon ("Property"). Defendant leased the premises from plaintiff until May 31, 2001. As relevant to these continuing proceedings, plaintiff contends that defendant is liable for cleanup of environmental contamination at the Property, and defendant contends it qualifies for an exception to liability under the contract.

History

The relevant history surrounding the Property dates back more than 50 years, when Sawyers, Inc., owned the Property and began a toy manufacturing facility on the site.[1] GAF corporation acquired Sawyers in 1967, and continued the toy manufacturing operations. GAF eventually sold the Property to View-Master in 1981, which operated a similar toy facility on the site. In 1983, View-Master sold the Property to Western International Properties, but then leased it back from Western to continue its operations. In 1984, Western sub-divided the Property and sold the relevant parcel to John Eyler. Eyler then conveyed the Property to Cascade Square Associates in 1985. In 1989, while View-Master was still leasing the Property, View-Master was acquired by Tyco.[2] Defendant acquired Tyco in 1997. Finally, in 1998 Cascade transferred its ownership interest in the Property to plaintiff.

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[1] At that time, the Property was separated into three parcels: parcels 1, 2, and 3. The parcel relevant to this action is parcel 1.

[2] Tyco refers collectively to Tyco Industries, Inc., Tyco Manufacturing Corporation and Tyco Toys, Inc.

The Lease Agreement

On March 5, 1991, View-Master entered into a Lease Agreement ("Lease") with Cascade Square Associates, pursuant to which Cascade Square Associates agreed to lease the premises to View-Master. The Lease provided that View-Master would lease the property for commercial purposes for a term of approximately six years. Because View-Master and its predecessors had used the Property and operated facilities there for many years, View-Master was more familiar with its condition. Consequently, the Lease provided that with certain limited exceptions, View-Master would indemnify Cascade for any activities undertaken by it or its predecessors on the Property.

On April 29, 1996, Cascade Square Associates and View-Master executed an amended lease ("Amended Lease"), which was substantially similar to the 1991 lease. After acquiring Tyco, defendant became the tenant under the Amended Lease. Defendant terminated the Amended Lease on May 31, 2001.

Environmental Issues on the Property

In 1950, a well and water tower were installed on the Property to supply water to the facility. Thereafter, between 1951 and 1980, Sawyers and GAF used trichloroethene ("TCE") in the toy manufacturing operations. While most of the work with TCE was done on the surrounding areas and not on the Property, Sawyers/GAF did dispose of sanitary wastes through a septic tank and drainfield located at the north end of the Property. There is no evidence that any party used TCE in any operations on the Property after 1981. It is undisputed that neither defendant nor any of its predecessors, however, ever tested the well water, groundwater or shallow soils for contaminants on the Property.

In March 1998, plaintiff commissioned SECOR, an environmental consultant, to test the Property's well water for

pollutants. SECOR discovered that the water contained TCE levels that far exceeded the federal maximum allowable level. Upon this discovery, the Oregon Department of Environmental Quality ("DEQ") began investigating the contamination and planning remedial measures. The DEQ investigation revealed additional contaminants, including petroleum hydrocarbons, cyanide, chromium and silver. Contamination was found on the Property as well as adjacent parcels, in the well water, the shallow soil, the groundwater and the deep aquifer underlying the Property. Upon discovery of the extensive contamination at the site, defendant shut down the well.

In November 1998, defendant and GAF entered into a consent order with DEQ, pursuant to which GAF agreed to investigate the environmental conditions of the Property and defendant agreed to provided public outreach and communication to its employees. As part of the site investigation, the DEQ performed a risk assessment to evaluate the levels of contaminants and the dangers they posed. The risk assessment identified current and future risks at the site: (1) unacceptable risk from TCE in the deep aquifer underlying the Property, if that source is used for drinking water; and (2) unacceptable risk from TCE in the drainfield area, primarily faced by trench workers performing excavation in that area who may be exposed to shallow groundwater. In addition, petroleum hydrocarbons were identified in the soil located under certain buildings on the Property. The DEQ found that the hydrocarbons posed no threat so long as the buildings remain, but noted that if the buildings were ever removed, the hydrocarbons in the soil would require treatment.

Plaintiff filed this action on March 10, 2000, raising three issues: (1) whether defendant legitimately terminated the Amended Lease on May 31, 2001; (2) whether defendant was obligated to indemnify plaintiff for costs related to environmental cleanup; and (3) whether defendant was obligated to indemnify plaintiff for expenses incurred in defending

itself against third party lawsuits. The first issue was resolved following a bench trial on April 27, 2001. The remaining issues were resolved in an arbitration held in December 2001. The arbitrator found in favor of defendant, concluding that it was not obligated to indemnify plaintiff for either environmental cleanup or third party lawsuits.

In reference to environmental cleanup, the arbitrator determined that defendant, Tyco, and View-Master had been in compliance with "applicable environmental laws" and were therefore excepted from liability under the Amended Lease.[3] The arbitrator then ordered plaintiff to pay defendant costs and fees incurred litigating the action.

This Court's 2002 and 2003 Decisions

On February 2, 2002, plaintiff filed a motion to vacate, modify, and/or correct the arbitrator's findings and award. In keeping with the scope of review set forth in the parties' arbitration agreement, I reviewed the arbitrator's findings of fact for substantial evidence and his conclusions of law for error.[4] Under those standards, I found that the arbitrator erred as a matter of law in concluding that the Oregon Drinking Water Quality Act ("ODWQA"), was not an "applicable environmental law" within the meaning of Sections 12c and

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[3] Sections 12(c) of the Lease provides:

> To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b above, Tenant shall not be held liable following the expiration of this Lease term for the following * * * (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

[4] Paragraph 27 of the Arbitration Agreement provides:

> The Court shall vacate, modify or correct any award: (I) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

13a of the Amended Lease. On April 29, 2002, I remanded the case to the arbitrator for reconsideration consistent with my ruling.

On remand, the arbitrator found defendant in violation of the ODWQA as an applicable environmental law, and designated plaintiff the prevailing party. I affirmed that decision on May 14, 2003. Both parties appealed to the Ninth Circuit Court of Appeals and, as noted, the case is before me on remand.

DISCUSSION

1. Standard of Review

In Kyocera, the Ninth Circuit held that federal court review of arbitral decisions is limited to the grounds set forth in the Federal Arbitration Act, 9 U.S.C. § 10, and that private parties have no power to alter or expand those grounds by stipulation or agreement. Kyocera, 341 F. 3d at 1000. That ruling formed the basis of the remand in this case. The Ninth Circuit specifically instructed this court to review the original arbitration award under the allowable grounds for vacatur in the FAA. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 2004 WL 2596020 (9th Cir. 2004).

The parties nonetheless disagree on the standard of review that governs my analysis on remand. Plaintiff contends that the original arbitration award should be vacated because the arbitrator's interpretation of the phrase "applicable environmental law" as excluding the ODWQA is an "implausible interpretation" of the contract. Defendant, in turn, argues that the arbitrator's interpretation is neither "completely irrational" nor in "manifest disregard for the law" and therefore not subject to judicial intervention under the FAA. Therefore, I must first determine what grounds for vacatur are "allowable" under the FAA.

Section 10 of the FAA allows vacatur if (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made. 9 U.S.C. § 10. Arbitrators "exceed their powers" when the award is "completely irrational," or exhibits a "manifest disregard of the law." Kyocera, 341 F. 3d at 997-98. In a recent post-Kyocera decision, the Ninth Circuit also confirmed that an arbitrator's "implausible interpretation of [a] contract" can be vacated under the FAA. Theis Research, Inc. v. Brown & Bain, 386 F. 3d 1180, 1185 (9th Cir. 2004) (citing Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh, 933 F.2d 1481 (9th Cir. 1991)), amended on denial of rehearing, 400 F.3d 659 (9th Cir. 2005).

Thus, although Kyocera does not mention the "implausible interpretation" standard, Theis clarifies the Ninth Circuit's position concerning the scope of review of an arbitrator's contract interpretation under the FAA. Several other circuits also apply the "implausible interpretation" standard in FAA cases. See, e.g., Bull HN Information Systems, Inc. v. Hutson, 229 F. 3d 321 (1st. Cir. 2000); Jacada, Ltd. v. International Marketing Strategies, Inc., 401 F. 3d 701 (6th Cir. 2005); George Watts & Sons, Inc. v. Tiffany and Co., 248 F. 3d 577 (7th Cir. 2001); Manion v. Nagin, 392 F. 3d 294 (8th Cir. 2004); Brown v. Coleman Co., Inc., 220 F.3d 1180 (10th Cir. 2000). Because the present dispute requires interpretation of a contract, I apply the "implausible interpretation" standard here.

2. Was the Arbitrator's Interpretation "Plausible"?

The arbitrator's interpretation of the contract must be sustained if it is plausible. Employers Ins., supra, 933 F.2d at 1486 (citing Sheet Metal Workers Intl Ass'n v. Arizona Mechanical & Stainless, Inc., 863 F. 2d 647, 653 (9th Cir.

1988)). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Intern. Union. AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); Employers Ins., 933 F.2d at 1486. Because "the parties [have] authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." Employers Ins., 933 F.3d at 1486 (citing United Paperworkers, 484 U.S. at 38).

My task is, therefore, to determine whether the arbitrator's interpretation of the phrase "applicable environmental laws" as excluding the ODWQA was "plausible." Employers Ins., 933 F.2d at 1487. I conclude that it was not.

Neither party seriously disputes that the ODWQA is an "environmental law." Mattel, for example, refers to the ODWQA as an "unrelated environmental law." Mattel's Memorandum of Points and Authorities in Support of Motion for Review and Modification of Arbitration Decisions, 12/16/02, p. 16.

The ODWQA is Oregon's version of the Federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26. See ORS 448.277 (authorizing the Department of Human Services ("DHS") to enter into an agreement with the federal government to administer the SDWA in Oregon). The SDWA is an environmental law. See, e.g., In re Willy, 831 F.2d 545, 546 (5th Cir. 1987) (including the SDWA in a list of "environmental statutes").

The text of the ODWQA directs the DHS to act in accordance with the "goal of the people of the State of Oregon to prevent contamination of Oregon's ground water resource while striving to conserve and restore this resource and to maintain the high quality of Oregon's ground water

resource for present and future uses." ORS 448.123(2), 448B.155. The ODWQA is therefore focused not only on treating water to protect public health but also on protecting ground water as an environmental resource. The ODWQA clearly is an environmental law.

However, the arbitrator reasoned that the ODWQA was not "applicable" within the meaning of the parties' lease because it applies to owners and operators of public water systems and is intended to protect, improve and provide safe drinking water to the public. From this premise the arbitrator determined that the ODWQA is not applicable to the indemnification exception for pollution liability under the lease.

Nothing in the lease supports the arbitrator's finding that the phrase "applicable environmental laws" means anything other than its plain meaning; i.e., the body of environmental law that generally applies to Mattel and with which Mattel's non-compliance could expose Mattel or Hall Street to civil or criminal penalties. As Hall Street explained in its recently filed objections to the original arbitration award:

> It is undisputed that Mattel failed to test the water on the Property for the presence of contaminants at any time during its twenty-year period of occupancy. The Arbitrator so found, (½/02 Findings of Fact ("FF"), ¶ 24) ("During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants."), and Mattel's counsel expressly acknowledged the fact in his closing argument at the arbitration. * * * ("[I]s Mattel proud of the fact that they didn't test the water? . . . Absolutely not."). Indeed, the TCE contamination was only discovered after Hall Street commissioned SECOR to test the wall water in 1998. (½/02 FF, ¶ 25.) When the well was finally tested, it "showed TCE concentrations ranging from 1220 to 1520 micrograms per liter (ug/L). The Federal Drinking Water Standard for TCE is 5 ug/L."

> * * * Mattel has never contested the fact, nor could they, that their failure to test the water at the site constituted a violation of the Oregon Drinking Water Quality Act.

Hall Street's Objections to Confirmation of Original Arbitration Award on Remand, 3/25/05, p. 4 (certain citations omitted). A twenty-year violation of the ODWQA carries a potential exposure of $3,650,000 of civil penalties under ORS 448.280 which provides, as relevant, a penalty of up to $500 for each day of violation.

I find Hall Street's contention valid that the parties contemplated compliance with *all* environmental laws affecting this property at the formation of the lease, including those meant to protect public health, and that Mattel should have understood that it not only had to refrain from further contaminating the property, it also had to ensure that the public was protected from any pre-existing contamination in order to trigger the indemnification exception to pollution liability.

The arbitrator cited no particular provision in the lease to support the plausibility of his reasoning. Indeed, no law would qualify as an "applicable environmental law" under the arbitrator's reasoning because no environmental statute is designed to protect property owners from property damage; the purpose of such statutes is to protect the environment and human health. Nothing in the lease supports the arbitrator's finding that the parties did not consider the ODWQA to be an "applicable environmental law" at the time of formation. Therefore, the January 2, 2002, original arbitration award is VACATED.

This brings me to the question of how to proceed. On remand of the original arbitration decision in April 2002, I directed the arbitrator to consider the ODWQA to be an applicable environmental law. The arbitrator did so, and issued an amended arbitration decision generally favoring

Hall Street, followed by a Final Arbitration Award. Both parties challenged the second award, and in May 2003, I issued an opinion adopting in part and reversing in part the arbitrator's decision and entered judgment accordingly.

Now, as then, my resolution of the currently pending issue requires no further action by the arbitrator. Therefore, I enter judgment in accordance with my Opinion and Order filed on May 1, 2003.

IT IS SO ORDERED.

DATED this 29th day of June, 2005.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JUN 5, 2005]

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited-liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

JUDGMENT

In accordance with the Opinion and Order dated May 1, 2003, the Opinion and Order dated July 14, 2003, the Judgment entered on May 15, 2003, and the Opinion and Order filed this date,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That plaintiff Hall Street Associates, L.L.C., is declared the prevailing party in this action;

2. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for damages incurred in the amount of $484,031.12;

3. That judgment be awarded to plaintiff Hall Street Associates, L.L.C., for attorneys' fees incurred of $252,065.32 and costs incurred of $74,011.05, and for supplemental attorneys' fees of $47,930.75 and supplemental costs and expenses of $2,610.12;

4. That interest will accrue on the judgment for damages ($484,031.12) at the rate of nine percent (9%) from the date of the arbitration award (November 19, 2002) until this Court enters judgment;

5. That interest will accrue on both the judgment for damages and the judgment for attorneys' fees and costs at the rate of six percent (6%) from the entry of judgment until paid;

6. That declaratory judgment be awarded in favor of plaintiff Hall Street Associates, L.L.C. and against defendant Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental clean up of the property; and

7. That, if appropriate, plaintiff Hall Street Associates, L.L.C. shall submit a supplemental attorney fee petition for fees and costs incurred since entry of judgment on May 13, 2003, within fourteen (14) days after entry of this judgment, pursuant to FRCP 54(d)(2)(B).

DATED this 29th day of June, 2003.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG 1, 2006]

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,

Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted July 25, 2006
Portland, Oregon

MEMORANDUM*

Before: GOODWIN, REINHARDT, and GRABER, Circuit Judges.

This appeal of the district court's refusal to enforce an arbitration award is before us for the second time. *See Hall St. Assoc., LLC v. Mattel, Inc.*, 113 Fed. Appx. 272 (9th Cir. 2004). Initially, we reversed the district court for using an improper standard of review and provided instructions to enforce the arbitration award unless grounds for not doing so existed under either 9 U.S.C. §§ 10 or 11. *Id.* at 272. On remand, the district court again failed to enforce the arbitration award, this time because it was "implausible." Implausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11.

Although the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins.*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Co. of Pittsburgh, 933 F.2d 1481, 1486 (9th Cir. 1991) ("We may not predicate reversal on . . . erroneous findings of fact or conclusions of law."); *see also Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001) ("Our task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit."). Furthermore, it cannot be said that the arbitrator's decision in this case is "completely irrational." *See Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (construing 9 U.S.C. § 10(a)(4), the only subsection of either 9 U.S.C. §§ 10 or 11 that could conceivably apply to the arbitration award in this case). Thus, we remand the case to the district court with instructions to enforce the original arbitration award and declare Mattel the prevailing party. The district court's award of attorneys' fees in favor of Hall Street Associates, L.L.C. v. Mattel, Inc., Nos. 05-35721, 05-35906

GRABER, Circuit Judge, dissenting:

I respectfully dissent because, although the majority correctly identifies the governing legal principles, I conclude that the arbitrator's decision was completely irrational.

Paragraph 12(a) of the Lease provides, as relevant here, that "Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises." Paragraph 12(c) of the Lease provides that the tenant shall not be held liable for certain items "[t]o the extent Tenant has been in compliance with applicable environmental laws." In context, the only rational reading of the phrase "applicable environmental laws" in Paragraph 12(c) is as shorthand for "all federal, state and local environmental laws and regulations in [Tenant's] use of the Premises," the longhand description just given in Paragraph 12(a). That is, any environmental law with which the tenant was required to comply in its use of the premises was "applicable" within the meaning of Paragraph 12 as a whole. Paragraph 12(b)

confirms the necessity of interpreting "applicable" in this way because it provides that the tenant "assumes all responsibility for the investigation and cleanup" of any hazardous waste on the premises and that the tenant is liable for, and must indemnify the landlord for, all costs resulting directly or indirectly from the "presence" of any hazardous waste on the premises.

This understanding of Paragraph 12 arises not only from the words and structure of the Lease, but also from the arbitrator's own findings as to the parties' intent. The arbitrator found that Mattel agreed to a comprehensive indemnification of Hall Street, irrespective of the time of the occurrence that resulted in the presence of hazardous wastes on the premises.

It is undisputed that the statute in question here is an "environmental law." The arbitrator's conclusion that the statute was not "applicable" is completely irrational in view of (a) the clear meaning of Paragraph 12 and (b) the undisputed facts that Mattel failed to test the water supply for eighteen years even though the statute required it to have done so, resulting in Mattel's signing of a consent order with the state's Department of Environmental Quality.

Accordingly, I would either affirm the decision of the district court (albeit on different grounds) or remand the case for reconsideration under the appropriate legal standard.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

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No. 05-35906
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HALL STREET ASSOCIATES, L.L.C.,
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Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

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TYCO INDUSTRIES, INC,
a Delaware corporation; et al.,
Defendants.

Appeal from the United States District Court
for the District of Oregon (Portland).

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED and REMANDED**.

Filed and entered Tuesday, August 1, 2006

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed OCT. 17, 2006]

No. 05-35721

D.C. No. CV-00-00355-REJ
District of Oregon,
Portland

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

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TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,

Defendants.

ORDER

Before: GOODWIN, REINHARDT, and GRABER, Circuit Judges.

Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.